The Influence of Religion on United States Supreme Court Decision Making

Undergraduate Research Thesis

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Abstract

Supreme Court justices are human beings; they are influenced by a variety of factors when making decisions. Existing research, in fact, suggests that justices are heavily influenced by ideology and policy preferences when deciding cases. Despite this, there is virtually no research on the role that religion plays in influencing United State Supreme Court decision making. In this thesis, I attempt to address this knowledge gap by qualitatively analyzing opinions written by justices and the religious backgrounds of these justices and through considering the voting patterns of justices of different religions. Given the complexities associated with researching this topic, there is much ambiguity surrounding any conclusions that can be reached from this research. As a result, definitive conclusions on the influence of religion on Supreme Court decision making cannot be reached; nonetheless, it appears that the religious views of justices possibly (and, in some cases, likely) play a role in influencing the justices' decisions in Establishment Clause and free exercise of religion cases, as well as in cases pertaining to abortion, the death penalty, and gay marriage. Religion may influence decision making in these cases in both explicit, or direct, and implicit, or indirect, manners.

Introduction

Citizens often like to perceive United States Supreme Court justices as legal machines: they analyze the law, and they make decisions based solely on the law. The reality, though, is that justices are human beings, and, like all human beings, they are influenced by a multitude of factors when making decisions. In fact, judicial scholars widely believe that justices are influenced by factors beyond just the law throughout their decision making process. The attitudinal model, for instance, suggests that justices' decisions are often determined by policy preferences (Segal and Spaeth). In an op-ed from just last month (March 2016), Judge Richard Posner, who sits on the U.S. Court of Appeals for the Seventh District said, "The priors that

seem to exert the strongest influence on present-day Supreme Court justices are political ideology and attitudes toward religion." By priors, Posner refers to all of the things—education, background, socioeconomic status, etc.—that justices carry with them before they even begin the legal analysis of a case.

Despite the widely held belief that justices' decisions are influenced by factors beyond the law and Judge Posner's comments on the significance of religion to Supreme Court decision making, there is surprisingly little scholarship on how religion—with regard to both religious affiliation and religiosity—influences decision making on the Supreme Court. In this thesis, I attempt to fill at least a portion of the gap in our understanding of Supreme Court decision making left by existing research. For this reason, this research is of academic significance as it builds off of prior research and aspires to establish a foundation on which future researchers can build. Additionally, studying the influence of religion on Supreme Court decision making is useful, first and foremost, because it broadly serves as a way to understand the Court better. More specifically, this research provides a greater understanding of the factors that influence Supreme Court decision making. This understanding may have the greater effect of assisting litigants as they prepare cases to be heard before the Supreme Court. Similarly, a greater understanding of the Court among the public might affect the perceived legitimacy of the Court; this is extremely significant because the power of the Court comes from its perceived legitimacy among the public. For these reasons, this research is relevant to academics and also has implications for society at large.

I proceed by first providing a theoretical discussion of the manner in which the religion of potential nominees may influence the nomination process when filling Supreme Court vacancies. From here, I include a general discussion of the possible relationship between religion and justices as decision makers before providing individual analyses for each of the nine justices

of the 2015-2016 Supreme Court; in these analyses, I discuss the religious backgrounds of each justice and consider the greater ramifications that these backgrounds might have on the decisions made by these justices. I then move on to provide analyses of cases—first, cases pertaining directly to religion, and then cases pertaining to policy issues that are often connected to religion. These analyses are predominantly qualitative in nature, although I do provide quantitative data when possible. Finally, I provide a discussion of the conclusions and the significance of this research. I openly acknowledge that there is a substantial amount of ambiguity with regard to this topic. In many cases, it is not clear to what extent religion influences decision making (if at all). This ambiguity makes it hard to reach definitive conclusions. I attempt to acknowledge this throughout the thesis while still providing results and conclusions that are supported by a thorough analysis of justices and cases whenever possible.

The Role of Religion in the Nomination Process

There are a multitude of reasons to analyze the nomination process of Supreme Court justices when looking at the influence of religion on Supreme Court decision making. First and foremost, the decisions that are made by the Court are ultimately determined by who is actually on the Court; furthermore, who is on the Court depends on the nomination process. If religion has any influence on the nomination process, it—as a matter of consequence—also has an effect on which individuals end up serving as justices. In this case, religion would ultimately impact Supreme Court decision making through impacting who is on the Court in the first place. Additionally, the unique makeup of the present-day Supreme Court makes analyzing the role of religion in the nomination process particularly interesting. For the first time in history, the majority of the Court is Catholic. In fact, the Supreme Court of 2015-2016 consists of six

Catholic justices, three Jewish justices, and no Protestant justices[1]. The existence of this Catholic majority has led some scholars to argue that the selection of Catholic justices may have violated the Constitution's prohibition of religious tests for public office in Article VI, the Due Process Clause of the Fifth Amendment, or the Establishment Clause of the First Amendment (Gerhardt 30). Regardless of the constitutionality of the religious breakdown of the Court, the high number of Catholics naturally leads one to wonder what role—if any—religion plays in the nomination of Supreme Court justices.

Christine Nemacheck lays out a systematic model to explain the process by which presidents make decisions on whom to nominate to fill Supreme Court vacancies. Nemacheck argues that presidents seek to nominate individuals about whom they have the least uncertainty. In her words, "[A] prominent strategy used by presidents in the selection process is to try to identify factors that lessen their uncertainty. By pursuing this strategy, presidents hope to identify appointees who by in large meet or closely approximate their expectations" (44). Though Nemacheck does not explicitly include religion in her model, it seems natural that religion could be one factor about which a president would want to limit uncertainty. More interestingly, knowledge of a nominee's religion could potentially reduce uncertainty about other factors that are important to the selection process. (A candidate's membership in a particular religious affiliation, for instance, may signal to the president that the candidate has particular policy preferences.)

In addition to potentially reducing uncertainty, there are very specific ways in which religion could influence the nomination decision. According to Goldman, judicial appointments can be made based on a policy agenda, a partisan agenda, or a personal agenda (2). Personal

[1] Justice Antonin Scalia passed away on February 13, 2016. Given the timing of this, I continue to include him as part of the 2016-2016 United States Supreme Court.

agenda refers to a nomination of the president's personal friend. A president is utilizing a policy agenda if he nominates a justice whose ideology and/or policy objectives align with those of the president. Finally, partisan agenda occurs when the president nominates a member of a particular group in the hopes that this will result in the group being more favorable to the president's political party. While religion likely plays no role in the personal agenda, it can certainly play a role in shaping both policy and partisan agendas. For instance, a president could potentially nominate a member of a religious affiliation with the intent of gaining political support among members of this religious affiliation. However, a nominee's religion could also play a role with regard to the policy agenda. Religion could influence ideology and, hence, policy goals. If this is the case, religion would be connected to a policy agenda because certain religious affiliations (or religiosity) would serve as signals for certain policies.

The question then becomes: which of these agendas do presidents actually use when nominating justices, and what role does religion play in shaping this agenda? To answer simply, it depends. In other words, it varies from president to president. For instance, in nominating William Brennan to the Court, President Eisenhower exclusively used a partisan agenda. The Catholic vote was an incredibly important target of Eisenhower's re-election campaign in 1956; as such, he was highly interested in maintaining the Catholic seat on the Court (Yalof 55). Yalof states that the selection of Brennan, a Catholic, "was all but preordained from the moment that Eisenhower decided to exploit the vacancy to pursue a number of immediate but unrelated political ends" (61). In sticking with Nemacheck's theory of presidents limiting uncertainty, Brennan's priest was visited to ensure that Brennan was a "good Catholic" before the nomination was made. In this particular nomination, Eisenhower's sole criterion was based on the partisan agenda, and he gathered information to limit uncertainty about this criterion. Since Nixon's presidency, however, presidents have regarded religion as being largely irrelevant when

nominating Supreme Court justices (Goldman 1). As Abraham states, the role of religion "has become far less of a problem cum consideration in appointments than race or gender, if indeed it remains as one at all" (Abraham 50).

It is clear, however, that these scholars are discussing the role of religion in nominations solely as it pertains to the partisan agenda. Religion, of course, may still play a role if presidents choose to approach the nomination process using a policy agenda, and, in fact, there are strong indications, that, in general, there has been a shift away from the partisan agenda toward a greater use of the policy agenda. For instance, George W. Bush said that he would nominate strict constructionists (individuals who seek to limit judicial interpretation)—similar to Scalia and Thomas (both of whom are Catholic)—to the Court. He ended up nominating Alito and Roberts, who are also both Catholic. While it is difficult to reach anything other than speculative conclusions, the fact that he nominated two Catholics who were intended to be similar to two other Catholics suggests that Catholic doctrine may inherently make Catholics more likely to limit the reaches of judicial interpretation and to stick more consistently to the plain language of the Constitution and statutes. If this is the case, religion likely played a role in Bush's stated policy agenda of nominating strict constructionists. In addition, Cochran writes, "In my view, the Catholic doctrines help to explain the substantial growth in the number of Catholics appointed to the Court in recent decades. My argument is not that presidents who nominate, citizens who support, and senators who confirm Catholic candidates to the Court are necessarily aware of the Catholic doctrines…My argument is that candidates formed in a Catholic culture that is shaped by these doctrines develop habits of thinking that make them attractive Supreme Court candidates" (126). It may very well be that Catholic theology lends itself to an ideology that makes Catholics particularly attractive nominees; this is perhaps at least a partial explanation for why so many Catholics are on the Court today.

Abortion, it appears, is a policy issue that has become of particular importance to presidents when making Supreme Court nominations in recent years. Thus, abortion provides a unique example of how the policy agenda can influence the nomination process. Dating back to Ronald Reagan, who wanted to nominate justices who would overturn *Roe v. Wade* (1973), abortion has been a key policy issue for Republican presidents. Republican presidents are likely to nominate candidates who oppose abortion, which may make it more likely for Catholics to be nominated by Republican presidents. Goldman writes, "The Catholic Church has been at the forefront of opposition to abortion, and many conservative Catholic lawyers and jurists have consequently been drawn to the Republican Party and placed in the pool of potential judicial appointees" (14). Catholic doctrine, due to its opposition to abortion, may make Catholics particularly strong candidates for Republican presidents looking to make nominations to the Supreme Court, particularly if the policy agenda continues to rule, as scholars suggest it has ever since the Nixon presidency. More specifically, the extent to which abortion is an important policy issue for a Republican president, the extent to which the president chooses to pursue a policy agenda, and the extent to which the president believes Catholics are more likely to oppose abortion than members of other religious affiliations may all have an impact on the likelihood of Catholics being nominated by Republican presidents in the present age. Interestingly, abortion may have also influenced President Obama's nomination decisions. Both times President Obama needed to fill a Supreme Court vacancy, he strongly considered nominating Diane Wood to the Court; however, there were concerns about how the Senate would receive her policy preferences on abortion. As Toobin states, "Obama liked and admired Wood, but the benefits of appointing her were, from a political perspective, unclear" (131). Though Obama's motives for not nominating Wood were primarily political and not based on a policy agenda, this episode shows how powerful of a role views on abortion can play in Supreme Court nominations.

While it appears that, over time, there has been a movement toward the use of a policy agenda, the previous discussion on abortion allows for some interesting speculation. Republican presidents, it seems, are likely to be influenced by ideology and policy preferences—meaning they are more likely to use a policy agenda—than Democratic presidents. Democratic presidents, on the other hand, may be more focused on balancing representativeness or on pursuing a partisan agenda. A quick look at the two most recent presidents reveals this distinction between the two political parties. As previously noted, President Bush was very clear in wanting strict constructionists and justices who would be aligned with him ideologically; this is a clear use of the policy agenda. Conversely, Obama made his two nominations based primarily on political reasons. Toobin writes, "Obama and his team wanted a no-drama confirmation. His nominee should be confirmed with as little disruption as possible" (125). This desire for an easy confirmation, combined with the political appeal of nominating the first Latina to the Court—an attempt at balancing representativeness—made the decision to nominate Sonia Sotomayor easy. Similarly, Kagan, a Jew, "was probably an easy confirmation" (Toobin 223). President Obama's decision to nominate two women—one of a minority race and one of a minority religion—potentially reveals his desire to balance representativeness on the Court. In doing so, he made calculated political decisions. While this may not be the partisan agenda as described by Goldman, these moves were certainly intended to be political victories for Obama and, as a consequence, political victories for his party. Though it is foolish to try to reach too many assumptions from the case studies of the nominations of the recent presidents, it does seem that President Bush's nominations, fueled by the policy agenda, were more influenced by the religious views of nominees than President Obama's nominations. This is consistent with the belief—expressed by Abraham—that the role of religion has dwindled in the partisan agenda;

furthermore, this may provide evidence that religion can still be an important factor when a policy agenda is used.

It is extremely difficult to reach firm conclusions about the nominations of Supreme Court justices. Different presidents have different objectives and, thus, approach the nomination process using different types of agendas and valuing different criteria. Despite all of this, some speculative conclusions can be reached. First of all, it seems that presidents must be analyzed individually when assessing the role that religion plays in the nomination process. In addition, it can be reasonably concluded that religion has played a role in the nomination process when presidents have approached the process using a partisan agenda and also when presidents have used a policy agenda. It may also be the case—particularly with the salience of abortion as a political topic—that the policy agenda may be growing in importance. If so, the extent to which religion impacts ideology (a topic which will be heavily discussed when analyzing decisions in sections to follow) and, as a result, policy objectives, may determine the extent to which religion plays a role in influencing the nomination process and, ultimately, in influencing Supreme Court decision making. Regardless of the exact extent to which religion has influenced the nominations of Supreme Court justices historically and in recent years, perhaps the simple fact that religion *could* theoretically (and quite realistically) alter the nomination processes undertaken by presidents makes analyzing religion in the context of Supreme Court nominations interesting and important. It is quite reasonable to imagine a president nominating a member of a minority religion simply because he/she feels it is the right thing to do. While this may have been more realistic in the past when there was a Protestant majority on the Court, it is easy to also envision a president nominating a Protestant now simply to improve representativeness. While any consideration of religion's effect on the nomination process may largely be a thought exercise, the historical effect of religion on nominations in the past—and the likelihood that religion will

(or at least easily could) influence the nomination process in the future—make this an important topic for further inquiry.

Religion and Justices as Decision Makers

Supreme Court justices are ultimately decision makers. Using multiple factors, they analyze a case and reach a decision. Religion is one such possible factor, and there is a multitude of ways in which religion could theoretically influence the decisions made by justices. For instance, religion might explicitly influence the votes of justices if justices are simply more inclined to vote in alignment with the official views of their religious affiliation. A hypothetical example of this would be a justice who always votes to restrict free speech (even if this contradicts his/her ideology) simply because his religion officially opposes free speech. Religion could also theoretically implicitly influence Supreme Court decision making through a variety of mechanisms. For instance, religion could influence the ideology of a justice and then the ideology of that justice might ultimately determine that justice's vote. An evangelical Christian justice, for example, who is conservative might always vote in a conservative direction. In this case, while ideology might serve as a fine explanatory variable, it might actually be that it is his/her evangelical Christianity that inclines him/her to be conservative. If this is the case, religion would actually serve as a more complete explanation of the justice's votes. (There are not actually any evangelical Christians currently on the Court.) In addition, religion could implicitly influence decisions, in theory, if it influences the manner in which a justice of a particular religion relates to certain types of litigants or if religion, in addition to influencing ideology, has an influence on the principles that a justice uses for constitutional or statutory interpretation.

There are numerous challenges when it comes to determining how religion influences justices as decision makers. Most obviously, the justices do not acknowledge that religion

influences their decisions; therefore, the relationship between religion and judicial decision making must almost always be inferred through careful analysis and consideration. This challenge is further complicated by the fact that the sample size—in terms of both the number of justices and relevant cases—is relatively small, making it nearly impossible to conduct a thorough quantitative analysis of the relationship between religion and justices' votes. With regard specifically to the potential relationship between religion and ideology, it is difficult to determine, even if a relationship between the two exists, in which direction the causality runs. Does a justice's religion influence his ideology, for instance, or is it the other way around? (Another possibility is that they mutually reinforce each other.) There is also a methodological challenge that arises when it comes to considering ideology and religion simultaneously. This challenge is that religion and ideology often coincide so closely that it can be difficult to separate one from the other. In other words, it can be difficult to distinguish which of these factors actually influences justices when making decisions.

All of the considerations listed above result in ambiguity in many cases. There are, nonetheless, still conclusions than can be reached for at least certain types of cases. In addition, this ambiguity suggests that justices must be analyzed individually to determine how religion specifically influences each of them. Justices are, of course, individuals who collectively make up an institution; therefore, it is likely that the decision making process of each justice will be influenced by religion in a manner that is different than the effect of religion on the decision making processes of the other justices.

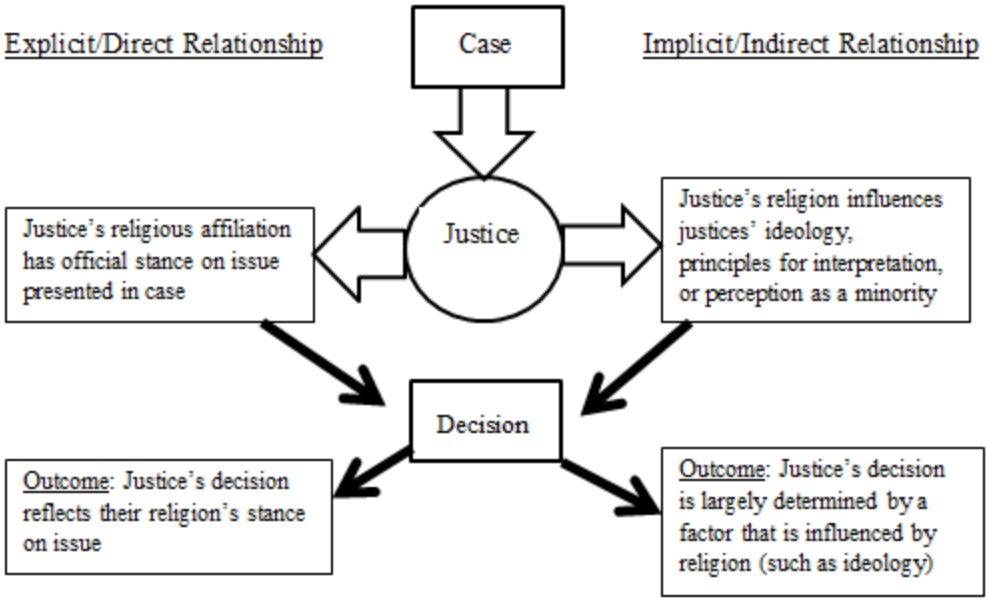

Figure 1: A diagram of the potential mechanisms through which religion could influence the decision making processes of Supreme Court justices. The left side of the diagram assumes an explicit (direct) relationship between religion and decision making. The right side assumes an implicit (indirect) relationship between religion and decision making.

Individualized Overview of Justices

While the last section focused broadly on the theoretical frameworks through which religion might influence Supreme Court decision making—with no particular attention paid to any era or timeframe—the next few sections will focus specifically on the Roberts Court—the Court since 2005—and will give attention to the justices of 2015-2016. In upcoming sections, I will conduct various analyses in order to further understand the manner in which the religious views—in terms of both affiliation and strength of religious beliefs—of justices ultimately influence decisions reached by the United State Supreme Court. Before diving into such analyses, however, it is both important and necessary to provide an overview of the religious backgrounds and preferences of the justices of the 2015-2016 Court.

An understanding of the religious environment of the Supreme Court is useful for a variety of reasons. First and foremost, this broad overview will provide useful information that is necessary for discerning what role religion plays in Supreme Court decision making. Several of

the topics discussed within this section will prove to be valuable when analyzing the decisions reached by the Court. In other words, it is impossible to fully understand the forthcoming analyses without first understanding the broad overview. As will become clear, attempting to evaluate the role of religion in Supreme Court decision making is, by nature, highly speculative. A basic understanding of the religious make-up of the Court may be necessary for understanding the nuances of decision making and can be helpful for making sense of decisions reached by justices—both with regard to broad patterns of decision making and decisions made within individual cases.

Among the members of the 2015-2016 Court, there are six Catholics—Roberts, Scalia, Thomas, Alito, Kennedy, and Sotomayor—and three Jewish justices: Ginsburg, Breyer, and Kagan. As has previously been mentioned, the fact that this is the first Catholic majority Court is—in and of itself—significant. This fact also creates a unique and unprecedented religious environment on the Court. Five of the Catholic justices—Roberts, Scalia, Thomas, Alito, and Kennedy—are considered to be conservative justices, although Kennedy is often the swing vote on the Court. The remaining Catholic, Sotomayor, leans in a liberal direction. All three Jewish justices are liberal justices. To summarize, there are five Catholic, conservative justices, one Catholic, liberal justice, and three Jewish, liberal justices. The relationship between religion and ideology will be further explored throughout the remainder of the thesis.

A broad overview of religion on the Court is undoubtedly useful; however, a more nuanced and individual-level overview of the religious backgrounds of justices is also necessary. Such an individual-level analysis is useful because religion can influence justices in differing ways. For instance, two Catholic justices might be uniquely impacted by religion despite belonging to the same religious affiliation. It is, therefore, not accurate to assume that religion—in all instances—influences justices in the exact same manners and to the same extents.

Furthermore, for a multitude of reasons, a justice's religious affiliation may be particularly influential in terms of how they approach decision making for specific issues but not for others. Therefore, I will now devote time to individually providing an overview on the role of religion in the lives—and on the ideology and principles of judicial interpretation—of the justices of the 2015-2016 Supreme Court.

Antonin Scalia

During his time on the Court, Antonin Scalia was one of the most religiously devout justices and was almost unanimously considered to be the most outspoken about his faith. Scalia was incredibly vocal about his Catholic faith and the impact that it had on his life. His religious devotion began at a young age; in fact, even as a high school student, Scalia was seen as an exemplary Catholic (Murphy 19). Though his faith began early in life, his religious beliefs were further solidified through the Catholic education he received at the Jesuit-affiliated Georgetown University. Joan Biskupic recounts a tale in which, during Scalia's final oral exams at Georgetown, a professor asked Scalia what the most important historical event he had studied during his college years was. The professor quickly rebuked Scalia when he failed to mention the incarnation of Jesus. This encounter left a lasting impression on Scalia; in his own words, the lesson was to not "separate your religious life from your intellectual life. They're not separate" (Biskupic, 2009, 25). With this lesson in mind, Scalia's faith continued to play a crucial role in his life as he grew into one of the most influential legal minds in the nation. He and his wife raised their nine children as Catholics, and his son, the Reverend Paul Scalia—a Catholic priest—presided over the justice's funeral ceremony.

Scalia, however, was not just a devout Catholic; rather, he was an incredibly devout adherent of traditional Catholic tenets. He was, for example, very particular about the parish that he attended with his family. While raising his kids, Scalia would drive an hour to go to a more

traditional Catholic church. At this church, the Mass would be performed in the traditional Latin, the priest would face the altar (instead of the congregation), and—as a general rule—everything was less modern (Biskupic, 2009, 185). Later in life, Scalia would attend St. Catherine of Siena in Great Falls, VA, another church at which traditional Mass is held (Murphy 281) Rather than embracing the sweeping modernizing changes implemented by Vatican II in the 1960s, Scalia continued to hold onto the more traditional version of his Catholic faith. As Murphy writes, "By worshipping and acting on his own in such a traditional way, Scalia demonstrated repeatedly on many subjects just how different his traditional Catholic views were from post-Vatican II views" (283). Acknowledging this dichotomy between pre-Vatican II Catholicism and post-Vatican II Catholicism—and understanding Scalia's position on the pre-Vatican II side of the spectrum—is necessary for understanding how religion impacted Scalia's life.

Interestingly, despite Scalia's devout faith, he unequivocally claimed that there was a separation between his religious convictions and his principles for constitutional interpretation. Berg and Ross, with reference to Justices Scalia and Thomas, note that "they profess a sharp distinction between principles of morality and of constitutional interpretation" despite being the most outspokenly devout justices (402). Scalia himself stated that there is "no such thing as a 'Catholic judge'" (Barnes, 2008). He also articulated, "I am always reading a text and trying to give it the fairest interpretation possible. That's all I do. How can my religious views have anything to do with that?...I will strike down *Roe v. Wade*, but I will also strike down a law that is the opposite of *Roe v. Wade*…I have religious views on the subject. But they have nothing whatsoever to do with my job" (Biskupic, 2009, 191). Despite the old lesson that there is no separation between religious life and intellectual life (as noted earlier), Scalia consistently insisted that his faith had no legitimate impact on his judicial decision making.

Certainly, it is possible (and quite likely) that Scalia may have actually believed that his faith did not influence his judicial decision making. However, this does not necessarily mean that religion actually had no influence on the manner in which Justice Scalia interpreted the law and, ultimately, made decisions. Furthermore, there is significant evidence that suggests that religion, in fact, significantly impacted Scalia's decision making. First and foremost, Scalia himself acknowledged that a judge's moral perceptions are constantly in the background (Biskupic, 2009, 114). In addition, Berg and Ross point out that Scalia's methods of constitutional interpretation allowed "for substantial reference to traditional religious views and produce results largely in harmony with them" (414). Still, the greatest indicator that Scalia's decisions were potentially influenced by religion is the apparent strong connection between his traditional Catholic faith and his "originalist" principle for constitutional interpretation.

Scalia's method for constitutional interpretation was that of originalism; in other words, when interpreting the Constitution, Scalia usually sought to look at the original meaning of the Constitution. The meaning of the Constitution, according to Scalia does not evolve or change over time. With regard to the Constitution, Scalia said, "It's not a living document. It's dead, dead, dead" (Tsiaperas). Similarly, with regard to the interpretation of statutes, Scalia subscribed to textualism, meaning he believed that the words of a statute plainly dictate the meaning of the statute (Cushman 470). Berg and Ross write that through his "limited sources" approach, Scalia relied on "the text, original intent, or clearly-established legal traditions" (402). This heavy reliance upon the original meaning of a document in many ways parallels Scalia's preference for a more traditional (or unchanged) form of Catholicism, and numerous scholars have picked up on this connection. Biskupic, for instance, quotes George Kannar, who writes that Scalia's originalist approach is linked to his "'cathechism' roots as the son of observant Catholics and a graduate of the Jesuit-run Xavier High School and Georgetown University" in a pre-Vatican II

America (2009, 191). Similarly, Murphy writes, "[F]or Scalia, there were strong similarities between the literal reading of biblical text and the use of historical sources to interpret Scripture in the pre-Vatican II Catholic faith, and the historically based dictionary technique for interpreting the Constitution in his originalist/textualist legal philosophy" (366). A more nuanced understanding of pre-Vatican II Catholic theology makes the connection between Scalia's faith and his interpretive principles even more clear. Before Vatican II, the Catholic Church was based on *ressourcement*, a French notion meaning a return to the sources (Murphy 15). It is thus clear that there were strong similarities between Scalia's religious practice and his principles for constitutional and statutory interpretation that cannot be merely overlooked.

Admittedly, given the strong correlation between Scalia's religious views and his ideology/interpretive principles, it is difficult to discern in which direction the causal chain lies. It is at least conceivable that his ideology leads him to be an adherent of pre-Vatican II principles. However, given his devoutness—and the role that his Catholic faith played throughout his entire life (and his own admittance that his faith is not separate from his intellectual life)—it is reasonable to suggest that it is, in fact, his faith that influences his ideology (which, perhaps, then reaffirms his faith). Biskupic addresses this when she writes, "Scalia could not separate his constitutional views from the core of his identity, which was decidedly Catholic. Professor Kannar rightly asserted, 'Whatever he may represent politically, Justice Scalia is also an individual in whom constitutional theory and personal identity fuse'" (2009, 210). Whether Scalia wanted to believe it or not, it seems almost certain that his identity as a traditional Catholic influenced the manner in which he approached decision making on the Supreme Court.

Of course, it is difficult—and in all likelihood impossible—to fully understand the manner in which religion influenced Justice Scalia's principles for judicial decision making. In

the case of Scalia, though, it appears that his religious views heavily influenced both his ideology and his principles for judicial interpretation. This, in turn, had a significant impact on the final decisions that Scalia made. Scalia may very well have approached cases without explicitly considering his religious beliefs; however, his religious beliefs likely were already accounted for when he established his originalist approach to judicial decision making. In this regard, his religious views likely implicitly impacted every case heard by Justice Scalia. Scalia's traditional Catholic identity was nearly inextricably linked to both his ideology and to his principles for constitutional interpretation, a fact that cannot be ignored. Ultimately, this connection between his faith and his ideology led Scalia to reach decisions that aligned with the Catholic Church in the majority of cases, and—as will be discussed later—Scalia's traditional Catholic faith can even be used to offer explanations in cases in which Scalia's decisions deviated from Catholic doctrine.

Clarence Thomas

In many ways—in terms of religious preferences, ideology, and interpretive principles—Clarence Thomas resembles Antonin Scalia. Thomas, like Scalia, is one of the most conservative members of the Court. Thomas is also one of the most openly devout justices (Berg and Ross 414), and, like Antonin Scalia, Thomas is an originalist who uses a "limited sources" approach to constitutional interpretation (Berg and Ross 402). In addition, like Scalia, Thomas attends Mass at a church (St. Andrew the Apostle Church, in Clifton, VA) in which traditional Mass is held (Murphy 281). Though less scholarly attention is devoted to Thomas's adherence to traditional Catholicism than Scalia's, it is reasonable to think that, given Thomas's devout faith, his religious views might influence his decision making in a way that is similar to the manner in which Scalia's decision making was influenced by religion.

Despite their shared belief in the traditional Catholic faith, Thomas and Scalia have surprisingly distinct religious backgrounds and journeys. Before attending college at Holy Cross, Thomas actually attended Immaculate Conception, a Catholic seminary. It seems, however, that his time at the seminary left him somewhat disillusioned. Merida and Fletcher write, "His seminary years presented a welter of contradictions…The church was supposed to be about brotherhood and understanding, but instead he found racism and hypocrisy at nearly every turn" (98). With regard to this issue of racism, Thomas—in his memoir—reflects, "Yet the Church remained silent, and its silence haunted me. I have often thought that my life might well have followed a different route had the Church been as adamant about ending racism then as it is about ending abortion now" (42). Thomas's frustrations grew during his time at Holy Cross. He recounts that he went to Mass for the first and last time there during his second week on campus. He was turned off by the emphasis on Church dogma and the apparent lack of attention paid to the social issues that were relevant to him (Thomas 51). In this regard, Thomas's experiences are significantly different than Scalia's. While Scalia's faith was strengthened through his Catholic collegiate education, Thomas's faith was crippled throughout college.

Thomas's experiences, in fact, led him to abandon his faith and leave the Catholic Church. Later in life, however, Thomas regained his Christian faith, first as a Protestant and then, again, as a Catholic. In his memoir, Thomas reflects on how his reliance on his faith was able to get him through his notoriously difficult and trying confirmation process: "Virginia (Thomas's wife) and I bathed ourselves in God's unwavering love…After years of rejecting God, I'd slowly eased into a state of quiet ambivalence toward Him, but that wasn't good enough anymore: I had to go the whole way" (Thomas 237). He goes on to write, "The more hopeless things appeared and the more vulnerable I felt, the more I turned to God's comforting embrace, and over time my focus became primarily God centered" (249). Numerous times throughout the memoir, Thomas

refers to prayer and cites multiple pieces of Scripture, signifying the importance of his faith to his life. Despite Thomas's detours on his religious journey, he returned to Catholicism in 1996. In doing so, he noted that—during his tumultuous nomination process—many of the people who were most supportive were old friends from Holy Cross who seemed to possess a transcendent faith (Biskupic, 2001). Furthermore, not only did he return to Catholicism, but he regained a traditional Catholic faith that largely mirrors Scalia's.

Though Thomas, like Scalia, asserts that his faith does not influence his decision making (Berg and Ross 402), there is reason to believe that Thomas's faith does, in fact, influence his ideology and interpretive principles. First and foremost, as a human being, he (along with all of the justices) is likely to be influenced by his personal beliefs. Given the clear importance of faith to his life—as evidenced by the outspokenness in his memoir—it is, at least reasonable to assume that his faith has some sort of impact on his decisions. Furthermore, given the similarities between Thomas's faith and Scalia's faith, and between their principles for constitutional interpretation, it is likely that Catholicism influences Thomas in ways similar to the manner in which it influenced Scalia. His Catholic faith very well might make him more likely to favor conservative decisions. Additionally, as in Scalia's case, his traditional Catholic faith perhaps inclines him (or at least reinforces his desire) to use a limited sources approach to judicial interpretation; furthermore, this use of originalism, in and of itself, might make Thomas more likely to reach conservative decisions. Though the connection between his Catholic identity and his judicial decision making might not be as intricate as it was for Scalia, there is still a clear connection here. As a result, for both Thomas and Scalia, their traditional Catholic faith and their originalist principles for judicial interpretation reinforce one another. The end result of this interaction is that the justices have a strengthened conservative ideology. This is perhaps best

evidenced by the fact that Thomas makes largely conservative decisions, and his decisions are almost always in alignment with Catholic doctrine.

John Roberts and Samuel Alito

Chief Justice John Roberts and Justice Samuel Alito are two additional Catholic justices. Though they are not nearly as vocal about their faith as are Scalia and Alito, their adherence to Catholicism is not questioned. Roberts and his wife have followed conservative Catholic pastor, Monsignor Peter Vaghi from parish to parish (Murphy 358). In this regard, there is a clear distinction between Scalia and Thomas, on one hand, and Roberts on the other. While Thomas and Scalia specifically sought out parishes that offer traditional Mass, Roberts is clearly a disciple of a specific Catholic minister rather than an adherent of a particular parish. Nonetheless, this particular pastor is conservative, meaning Roberts adheres to a conservative Catholicism, similar to that of Scalia and Thomas. Roberts's devotion to his faith was further seen during his nomination process; he raised eyebrows when he suggested, during an informal meeting with a senator, that he would recuse himself from the Court rather than make a ruling that the Church considered immoral (Turley). Though Roberts did not attend a Catholic college—unlike Thomas and Scalia—he nonetheless received Catholic schooling in elementary school and high school (Cushman 496). With regard to Alito, Murphy writes, "Through its stated goal to teach its parishioners how to incorporate Catholicism into their daily lives, the Alitos' New Jersey church's mission statement made it clear that it was not the same kind of traditional conservative church as Scalia's St. Catherine's or Thomas's St. Andrew's" (359). Despite this, Murphy later points out that Alito's personal religious views seem to align fairly closely with the views of Scalia and Thomas. To summarize, though Roberts and Alito are not tightly linked to traditional (pre-Vatican II) Catholicism in the same way as Scalia and Thomas, they still subscribe to a conservative Catholic faith.

In addition to not being as strongly linked to traditional Catholicism as Scalia and Thomas, both Roberts and Alito are not known as prominent originalists on the Court. Due to this, unlike in the case of Thomas and Scalia, there is no clear link between their faith and their principles for constitutional interpretation. Given the fact that Roberts and Alito are adherents of conservative Catholicism, it is likely that their religious views have some influence over their ideology. Due to a lack of scholarly material on the religious preferences of Roberts and Alito, it is incredibly difficult to make any firm statements about the role that religion plays in the decision making of these justices. It is, however, reasonable that the mere fact that Roberts and Alito are conservative Catholics inclines them to reach conservative decisions. In fact, Roberts and Alito often make conservative decisions that do align with Catholic doctrine.

Anthony Kennedy

Scalia, Thomas, Roberts, and Alito are the four most conservative members of the Court. Like the aforementioned justices, Anthony Kennedy is also Catholic. Also like the four most conservative Catholics, Justice Kennedy tends to lean in a conservative direction, although he is typically seen as the most moderate member of the Court and often casts the deciding vote in split decisions. The religious backdrop against which Kennedy grew up differed from the environments of many of his Catholic counterparts (especially Scalia, who was the son of conservative Catholic immigrants). Although Kennedy was raised Catholic, he grew up in a more religiously inclusive northern California (Murphy 152). This perhaps makes him more sympathetic to other religious viewpoints. Murphy draws further distinctions between Kennedy and the more conservative Catholics. He writes, “Kennedy’s more intellectual approach to his Catholicism allowed him to form his own interpretation of Scripture, rather than relying on a dogmatic pronouncement from the Church.” (360). This, in particular, distinguishes Kennedy from the more traditional Scalia and Thomas. Undoubtedly, Kennedy’s experiences with

Catholicism differ significantly from the experiences of his more conservative Catholic colleagues, although at least one source claims that he "remains a devout adherent to the Roman Catholic faith in which he was raised" (Cushman 476).

In addition to his position as the swing justice, Kennedy is known for his unique focus on human dignity when approaching the decision making process. In particular, this emphasis on human dignity is reflected through the importance Kennedy places on ensuring that individuals are free from coercion. According to Jelliff, this emphasis on human dignity—and on freedom from coercion—reflects Catholic ideals as articulated in *Dignitatis Humanae*[2]. Jelliff further develops this thought by stating that Kennedy "has proved…to be a true son of the Roman Catholic Church by incorporating the Church's philosophy into his own approach to religious liberty and adopting its emphasis on the need for freedom from compulsion of any kind. The resemblance between his reasoning and that of the Vatican is too close to be coincidental" (348). It is important to note that this does not necessarily mean that Kennedy's respect for human dignity within his decisions is derived directly from Catholicism; however, it is difficult to ignore the connections between the religion and his emphasis on human dignity. At the least, it is likely that his faith affirms the importance that he gives to human dignity when making judicial decisions.

Kennedy's focus on human dignity influences numerous decisions that he makes across a variety of issues. For instance, in Establishment Clause cases, Kennedy often supports government support of religion; however, when evaluating such cases, he pays particular attention to whether or not laws are used to coerce people to participate in religion (Jelliff). Somewhat ironically, this means that Kennedy's faith—through creating an appreciation for

[2] *Dignitatis Humanae*, which is translated as "Of the Dignity of the Human Person," was a declaration on religious freedom and liberty of individuals that was released by Pope Paul VI in 1965.

human dignity—could theoretically lead him to, at times, rule against government support of his own religion if coercion is at play. Though Kennedy often votes against abortion (as will be seen later), Jelliff even suggests that, in one case in which Kennedy ruled in support of abortion, his decision was determined by his respect for human dignity (353). Lastly, Jelliff argues that Kennedy's respect for human dignity and individual liberty make him the Court's strongest proponent of protecting free speech.

It is apparent that the effect that Catholicism has on Kennedy varies significantly from the effect that the religion has on the more conservative Catholic justices. While in the case of some of the other Catholic justices, religion strongly shapes ideology and—in some cases—even shapes specific principles for constitutional and statutory interpretation, it appears that Catholicism may simply broadly influence Kennedy's conservative ideology. In the case of Kennedy, however, the greatest effect of his Catholic faith on his decision making is that it places his focus on human dignity. It is this emphasis on human dignity that allows Kennedy to be a swing voter and to sometimes reach decisions that deviate from official doctrine of the Catholic Church. Furthermore, given the significance that Kennedy's focus on human dignity has on many of his decisions, religion may indirectly have a very significant impact on the decision making of Justice Kennedy if indeed Catholicism is linked to his views on human dignity.

Sonia Sotomayor

Sonia Sotomayor is the sixth and final Catholic justice on the U.S. Supreme Court. Contrary to the other five Catholics, she is a liberal justice. Her position as the only liberal Catholic is unique and also raises some questions about the relationship between religious views and ideology among justices. After considering Sotomayor's unique experiences in the Catholic Church, it is not as surprising that Sotomayor is the only Catholic liberal on the Court.

Though Sotomayor was raised in the Catholic Church, her experience within the Church—contrary to some of her Catholic colleagues—was largely unpleasant. Although her family was not very religious, she grew up attending Blessed Sacrament grammar school for the quality education and discipline (Biskupic, 2014, 25). Her time in Catholic schooling, however, led to much frustration and bitterness. She recounts how the nuns at the school used physical violence to enforce discipline. "I often stewed with righteous anger over physical punishments...I accepted what the Sisters taught in religion class: that God is loving, merciful, charitable, forgiving. That message didn't jibe with adults smacking kids" (Sotomayor, 2013, 30). Her frustration grew after the church's disappointing response to her father's death when she was still a child. The priest from Blessed Sacrament, for instance, would not visit her mother after her father's death because Sotomayor's mom did not attend Mass on Sundays, and this enraged Sotomayor. She explains that her mom worked long hours on Sundays so that she could afford to send her children to a Catholic school but that she still sent her children to Mass with money for the offering. Referring to the priest of Blessed Sacrament, Sotomayor asks that, even if her mom "wasn't Christian enough, shouldn't he be more Christian?" (2013, 47). Sotomayor, it seems, became so disillusioned with the Catholic Church that she claims that, to her, Greek gods "seemed more realistic, more accessible, than the singular, all-forgiving, unchanging God of my Church" (2013, 48). Unlike the case of Antonin Scalia, growing up in a Catholic environment had the effect of pushing Sotomayor away from her faith.

In some ways, Sotomayor's disillusionment is reminiscent of Thomas's reaction to perceived racism within the Catholic Church. However, while Thomas eventually returned to his Catholic faith, Sotomayor remains not religious according to most accounts (Barnes, 2014). By her own admission she is not religious. In fact, in response to a question about her source for empowerment, "Sotomayor answered that she is not a religious fanatic, but sometimes in her job

she says, 'Oh, my God, help me!' and means it" (Frazier). Thus, while Sotomayor maintains at least some semblance of faith in a divine being, the fact that Sotomayor is no longer very religious is a fact that separates her from her five Catholic counterparts on the Court. This is not the only characteristic that distinguishes Sotomayor from the other Catholic justices, however. More specifically, Sotomayor's opinion of traditional (pre-Vatican II) Catholicism differs significantly from the views that many of her fellow Catholic justices have. With regard to the priest not facing the congregation during the Mass before Vatican II, Sotomayor reflects, "Now when he turned his back on us, it felt like just what it appeared to be: rejection " (2013, 47). She goes on to state that she was delighted by the changes made by Vatican II, which is in stark contrast with, for instance, Justice Scalia, who continued attending traditional Mass even years after Vatican II.

Given the vast differences between Sotomayor's religiosity and the religiosity of the other Catholic justices and between her view of conservative/traditional Catholicism and the view of traditional Catholicism adhered to by other Catholics on the Court, it should come as no surprise that the principles that Sotomayor uses for constitutional interpretation differ significantly from the principles of many of the other Catholic justices, particularly Scalia and Thomas. In particular, Biskupic notes that Sotomayor believes that the Constitution evolves over time, and she acknowledges that justices' decisions are a product of numerous factors, including their personal backgrounds and ideologies (2014, 123). Sotomayor's open admission that ideology can influence decisions (which is yet another difference between this liberal Catholic justice and most of the conservative Catholic justices) means that religion could play an influential role in Sotomayor's decision making if it influences her ideology. Due to her lack of religiosity and her disillusionment with the Church over time, however, it is not likely that Catholic doctrine has a direct impact on her ideology. Catholicism, though—or at least

Sotomayor's experiences with Catholicism—may still influence her decisions in some ways. Sotomayor, for instance (like Thomas), credits Catholic schooling with her rise from poverty to elite education (Barnes, 2014). Furthermore, she says that Catholic schooling "helped to shape who I am" (Sotomayor, 2013, 87). Given the importance that Sotomayor places on background and experiences within the decision making process, it is hard to believe that her experiences as a Catholic have no impact on her decision making. Perhaps her elite education—combined with her growing frustration with the Church—actually worked in some way to push her toward a liberal ideology. A more direct effect, however, is that her negative experiences with Catholicism make her significantly less likely to consider Catholic doctrine when making decisions than her Catholic colleagues and, ultimately make her less inclined to reach decisions that align with the Catholic Church.

For Sotomayor, her identity as a Catholic, in general, does not seem to be extremely influential in her ideology (likely due to her lack of religiosity or devotion to the faith). In contrast, the fact that she is Latina appears to play a much larger role in shaping her identity and, consequently, her ideology. In one speech, she stated, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life" (Cushman 505). Furthermore, in an address titled "A Latina Judge's Voice," Sotomayor said that "experiences as women and people of color affect our decisions." These comments further support the conclusion that Sotomayor believes personal experiences (which certainly could include religious experiences) influence judicial decision making. As a Latina, specifically, Sotomayor may simply be more inclined to reach liberal decisions. In addition, as a Latina, she has a firm understanding of what it is like to be a minority in this nation. In this regard, she may actually see herself as similar to Jewish justices, who are members of a religious minority. (This issue of being a religious minority will be discussed

throughout the thesis). Lastly, with regard to Catholicism, the values and ideologies of Hispanic Catholics tend to differ—sometimes substantially—from those of white Catholics. Therefore, it is necessary to consider how this particular identity might influence the decision making processes of Sotomayor.

Clearly, in a multitude of important manners, Sotomayor differs significantly from the other five Catholics on the Court. Most notably, Sotomayor differs from Scalia, and the differences between these two individuals highlight some important lessons about the role that religion plays with regard to influencing Supreme Court decision making. In Sotomayor's case, religion has a negligible effect on her ideology and, consequently, on her decision making. Conversely, in Scalia's case religion is correlated significantly not only with ideology but, even more specifically, with interpretive principles for decision making. The juxtaposition between these justices reveals that two individuals of the same faith can experience the faith completely differently and, as a result, be influenced by this faith in completely different manners. In this regard, the exact same religion can influence the ideologies of justices in completely different ways depending on religiosity, personal background, and life experiences. Above all, the contrast reveals that, while in some cases more general statements about the role of religion in decision making can be made, it is usually necessary to consider the role that religion plays for individual justices, as justices vary significantly and in meaningful ways.

Catholic Summary

As a whole, the Catholic justices tend to be very conservative (with the exception of Sotomayor, who is very liberal, and Anthony Kennedy, who is a moderate but still leans toward the conservative side). The exact manner in which the Catholic faith influences the ideologies, interpretive principles, and overall decision making of these justices, however, differs significantly from one justice to the next depending on a variety of factors. Religiosity and the

form of Catholicism (i.e. more traditional or more modern), in particular, are likely to vary the effect that Catholicism has on the decision making of justices. In general, the more devout a Catholic justice is, the more likely it is that there will be a correlation between their ideology and their religious beliefs although it can be quite difficult to discern in which direction the causality lies. In general, though, religion does influence the decision making of Catholic justices in meaningful ways.

Elena Kagan

Elena Kagan is one of the three Jewish justices currently sitting on the U.S. Supreme Court. Of the three Jews, she appears to have been the most involved in her religion throughout the course of her life. As a child, she, in fact, received Jewish religious instruction three days a week (Barnes, 2014). This instruction culminated in Kagan being the first girl to ever have a bat mitzvah at the Lincoln Square Synagogue, a modern Orthodox synagogue in New York City (Mears). Despite eventually landing at the modern Orthodox synagogue, Kagan's family bounced around across types of synagogues—including Conservative and Reform—before deciding on the Lincoln Square Synagogue (Mears). Although I could not find information on whether Kagan still attends synagogue regularly, and, if so, on which denomination, it seems as if she has experienced all three major branches of the religion and that, due to the denomination of the synagogue at which she had her bat mitzvah, she is likely most closely linked to the modern Orthodox denomination of Judaism. As Kagan has aged, her Jewish heritage has continued to be significant in shaping her identity. For instance, shortly after being confirmed to the Court, Kagan—speaking at a synagogue—discussed how Louis Brandeis—the first Jewish justice—stuck out in her mind (Mears). It is clear that Judaism was a presence in Kagan's life as a child and has continued to be, at least to some extent, important to her as an adult.

Similarly to many of her Catholic counterparts, Kagan believes that religion and principles for judicial interpretation should remain unconnected. According to Mears, Kagan has said, "We are all the sum of our experiences, but we all understand the role of the judge is to step back from any personal proclivities and look just at interpreting the law." According to this, Kagan is aware that personal experiences play a role in shaping the thought processes and preferences of individuals; however, Kagan also insists that it is the role of a justice to somehow remove these experiences from interpreting the law. Beyond her own views on the interaction between religion and judicial interpretation, Kagan also believes that—more broadly—religion simply is not a relevant factor when it comes to considering the Supreme Court. She says, "There are three Jews on the Court, but nobody talks about that. It doesn't matter, times have changed" (Mears). As a whole, Justice Kagan clearly thinks that religion should not influence the decision making of Supreme Court justices.

Despite Kagan's insistence that her religious views do not influence her decision making, this may not be the case. First of all, by Kagan's own admission, justices' backgrounds and experiences undoubtedly impact their worldviews and beliefs. Though she says that justices need to separate these aspects from their decision making, justices are, after all, human beings. It is highly unreasonable to expect justices to completely remove all of their experiences from their methods for interpreting the law. In Kagan's case, specifically, she has a Jewish background that is highlighted by her unprecedented bat mitzvah. Almost certainly, her Jewish background will—in some capacity—influence her decision making. Though the scholarship is admittedly limited, it appears that Kagan is at least somewhat devout (or was devout in the past, if nothing else). This devoutness could very well influence her ideology; most Jews are, in fact, liberal, and Kagan is no exception. Therefore, while it is difficult to make many assertions about the connection between Kagan's Jewish faith and her ideology and principles for legal interpretation,

it is reasonable to conclude that her religion plays at least a small role in the decisions that she makes.

Ruth Bader Ginsburg

Like Elena Kagan, Ruth Bader Ginsburg is a Jewish woman serving on the U.S. Supreme Court. Though she is culturally and ethnically a Jew, she is, by her own account, not an observant adherent of the religion. Though she was raised in an observant Jewish household, she traces her decision to not be very observant to her mother's death when she was 17 years old. Ginsburg was apparently disillusioned by the fact that, although "there was 'a house full of women,' Jewish law required 10 men to convene a minyan, or communal prayer" (Barnes, 2008). Despite not being observant, Ginsburg has nonetheless acknowledged that her identity as a Jew has taught her "lessons about what it means to be a minority" (Barnes, 2014). In this regard, though Ginsburg may not be a devout or observant Jew, Judaism has nonetheless had a profound impact on shaping her identity.

While being a Jew seems to be a large part of Ginsburg's identity, Ginsburg shares Kagan's sentiments that religion should have no place in judicial decision making, insisting that being a Jew does not influence her view of the law (Barnes, 2008). Ginsburg also shares Kagan's belief that—more broadly—the perception of being a Jew on the Court has changed over time. She has suggested, for instance, that Jews in the past were seen as "Jewish justices," and that Jewish justices are now seen as "justices who happen to be Jews" (Barnes, 2008). Though Ginsburg is adamant that religion should not influence judicial decision making, she has acknowledged that, as a result of being a Jew, she knows "'what it is like to be an outsider, what it's like to be the victim of prejudice'" (Barnes, 2008). In this manner, she once again mirrors Kagan, who suggests that justices are the sum of past experiences. Ginsburg acknowledges that her experiences as a Jew impact the manner in which she views certain individuals before the

Court even if she does not believe that her religious affiliation actually influences how she handles cases.

Due to Ginsburg's lack of adherence to the religious tenets of Judaism, there is no direct connection between Jewish doctrine and Ginsburg's ideology. Certainly, Ginsburg's relative lack of faith may naturally incline her to be more liberal, as is the typical trend throughout the nation. While there may not be a direct causal connection between Judaism and ideology or principles for constitutional interpretation in Ginsburg's case, her background as a Jew is likely to impact her decisions when it comes to cases involving minority groups (which will be addressed in a later section). Though religion may not play as direct of a role in influencing ideology as it does in the case of the devout Catholic justices—or even in the case of the more devout Jewish justice, Elena Kagan—religion still influences Ginsburg's decisions at least in some situations and scenarios.

Stephen Breyer

Stephen Breyer is the lone male Jewish justice on the Court today. There is limited scholarship available on his personal practice of the faith, although the religion appears to have had an impact on Breyer's identity. Cushman writes that Breyer was curious about his Jewish identity while growing up, which persuaded him to attend a religious school on Sundays. Cushman goes on to state that, in college, Breyer taught students at a synagogue (493). Beyond this, there is not much definitive knowledge of the effect of Breyer's religious background on his life. Breyer is, however, married to an Anglican, and one of his children is an Episcopal priest (Barnes, 2014). Certainly, this alone does not suggest that Breyer is nonreligious, but it—along with the lack of scholarly evidence on Breyer's faith—reasonably suggests that Breyer is likely not very devout or observant of his Jewish religion.

Despite the little available information on Breyer's religious beliefs, his Jewish faith might still have an influence on his decisions. For instance, at the Jewish Federations' 2014 General Assembly, Justice Breyer (as well as Justice Kagan) spoke on what it means to be a Jewish justice. At the Assembly, Breyer said, with reference to some Jewish ideals, "There is a message, and the message has something to do with tzedek, and it has something to do with tzedakah, and it has something to do with social justice, and the law should work out so there is not too much injustice in the way in which it does work out. Those are things I think" ("Supreme Court Justice Breyer Speak [sic] About Jewish Identity and Social Justice")[3]. Based on Justice Breyer's words, it is evident that his Jewish background influences his preferences with regard to adjudication and his principles for judicial interpretation. Regardless of his current religiosity, Breyer resonates with the Jewish ideals of tzedek and tzedakah and, as a result, approaches interpreting the law from a perspective of desiring to bring about Jewish social justice. Breyer's commitment to these Jewish doctrinal ideals likely has a direct influence on his ideology; it may be the case that a liberal ideology best enables him to enact these Jewish principles when making judicial decisions. In addition to the possible direct impact on ideology, these Jewish doctrines could foreseeably influence Breyer's decisions on specific sets of issues in which social justice is particularly relevant. Therefore, though there are indicators to suggest that Breyer is not a devout Jew, the Jewish doctrines of his background likely have a direct impact on his principles for interpretation, his ideology, and on his decisions in particular cases involving social justice issues.

[3] Tzedakah means charity, although it literally is translated as "righteousness," meaning doing the right thing. It is derived from the word "tzedek," and both words have implications on Jewish social justice (Katz).

Jewish Summary

In general, the Jewish justices are less devout than their Catholic colleagues. This lack of devotion—in and of itself—may make these justices more likely to be liberal, as, generally speaking, less religious individuals tend to be more liberal than more religiously devout individuals. Furthermore, while the Jewish justices may not be very devout, they are nonetheless still very connected to the Jewish culture and community. For instance, between 1998 and 2014, Breyer and Ginsburg each made at least six reimbursed appearances before Jewish groups, and Kagan made one such appearance between 2011 and 2014 (*Center for Public Integrity*). In general, Jews tend to be more likely to be liberal. The combination of a relative lack of religiosity and the connection of the justices to the Jewish culture might serve to influence the ideology of Jewish justices in a liberal direction. Furthermore, these justices all had fairly religious upbringings (regardless of their current religiosity); therefore, the doctrines of the Jewish faith still may further affirm these liberal ideologies; thus, being a Jew may have a direct influence on the ideologies of the Jewish justices. In addition, being a Jew has an impact on identity that is unmatched by Catholicism: Jewish justices on today's Court have an understanding of what it is like to be an outsider in a way that is foreign to the Catholic justices. In other words, the Jewish justices likely have a greater sense for what it means to be a minority. (In this regard, they are similar to Justice Sotomayor, whose identity as a Latina profoundly impacts her.) This identity as a minority or outsider influences the manner in which Jewish justices approach cases. In this regard, despite a lack of devoutness, the religion of Jewish justices likely still influences ideology and judicial decision making in significant and important ways.

Analyses of Cases and Opinions

The previous section provided a thorough overview on the religious backgrounds of the nine justices of the 2015-2016 U.S. Supreme Court. It also discussed some of the mechanisms and methods through which religious beliefs—specifically in the form of religiosity and religious affiliation—might influence Supreme Court decision making, particularly with regard to ideology and principles for constitutional and statutory interpretation. In order to gain a better understanding of how religion actually influences the decisions made by justices, however, it is necessary to analyze cases and opinions. Therefore, in this section, I will analyze a variety of cases heard by the Roberts Court (the Court since 2005) in which religion might have played a role in the decision making process of justices. In particular, I will look at cases pertaining directly to religion and cases that do not pertain to directly to religion but in which religion is relevant to the issues within the cases.

Cases Pertaining Directly to Religion

It is intuitive that a justice's religious beliefs or preferences might influence their decision making in cases pertaining directly to religion. The Establishment Clause and Free Exercise Clause of the First Amendment regulate the government's role in religious affairs. By "cases pertaining directly to religion," I am referring to cases dealing with either of these clauses or, in some instances, cases dealing with statutes that seek to protect freedom of religion.

Establishment Clause

The Establishment Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion." Cornell University's Legal Information Institute makes it clear that this clause does not merely prohibit the government from creating a state-sponsored religion; rather, the clause "also prohibits government actions that unduly favor one religion over another. It also prohibits the government from unduly preferring religion over non-religion, or

non-religion over religion" ("Establishment Clause"). As seen in Figure 2 (below), during the Roberts Court, there have only been two Establishment Clause cases. I used the Supreme Court Database to identify relevant cases, and I checked to ensure that the cases were coded correctly in the Database. I use the same method to identify relevant cases throughout the entire thesis.

	Ginsburg	Breyer	Stevens	Kagan	Sotomayor	Kennedy	Roberts	Alito	Thomas	Scalia	
Salazar (2010)	P	P*	P*		P	**A**	A*	A*	A	A*	5-4 (anti-claim)
Greece (2014)	P	P*		P*	P	**A**	A	A*	A*	A	5-4 (anti-claim)

Figure 2: A Guttman scale of Establishment Clause cases during the Roberts Court. "P" signifies a pro-claim vote, meaning a vote in favor of a claim that the Establishment Clause was violated. "A" signifies an anti-claim vote, meaning a vote not in favor of the claim that the Establishment Clause was violated. A letter in bold signifies that the justice wrote the majority opinion in the case. An asterisk indicates that the justice wrote either a concurring opinion or a dissenting opinion. Justice Stevens is in red because he is not a member of the 2015-2016 Court. A black box means the corresponding justice did not vote in the case.

Salazar v. Buono (2010)

In *Salazar v. Buono* (2010), the Court reached an anti-claim decision by a 5-4 vote, meaning the Court ruled that there was no violation of the Establishment Clause. This case involved a cross—which is, of course, a symbol of significance for Christianity—that was positioned on public land. Since the cross was located on land owned by the government, the lower courts ruled that this was in violation of the Establishment Clause; as such, the government was ordered to remove the cross. Instead of moving the cross, however, the government sold the land to private owners, which essentially allowed the cross to remain on display on the land. In this case, the Court ruled that the government's act to transfer the land to private ownership—as opposed to removing the cross as it was originally ordered to do—did not violate the Establishment Clause. The five most devout Catholic justices (all of the Catholics with the exception of Sotomayor) voted anti-claim. Kagan was not on the Court at this time, but the other two Jewish justices were joined by Sotomayor and Justice John Paul Stevens (a Protestant) as voting in the minority, or, in this case, voting pro-claim.

In his majority opinion, Kennedy seems to try to downplay the religious significance of the cross. He emphasizes the fact that a cross serves as a representation of more than just Christian ideals and theology. He writes, for instance, "[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, a Latin cross in the desert evokes far more than religion" (*Salazar*, at 721). In his concurring opinion, Alito further emphasizes this concept of the cross being at least partially removed from religion by stating, "[T]he original reason for the placement of the cross was to commemorate American war dead" (*Salazar*, at 725). For both Kennedy and Alito, the fact that the cross can serve a nonreligious purpose—despite its purpose as a religious symbol—appears to create a buffer that protects the government from endorsing a religion in this case. In addition, Kennedy notes, "The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society" (*Salazar*, at 719). For Kennedy, there is a clear distinction between endorsement and acknowledgment, and he rules that the government is merely acknowledging religion in this case.

Those in the minority disagree with the majority's treatment of the cross as a relatively nonreligious symbol. In his dissent, Stevens—joined by Sotomayor and Ginsburg[4]—writes, "A Latin cross necessarily symbolizes one of the most important tenets upon which believers in a benevolent Creator, as well as nonbelievers, are known to differ" (*Salazar*, at 739). He goes on to state that the nation cannot use a sectarian message as a means to commemorate soldiers (*Salazar*, at 739). Those in the minority also disagree with Kennedy's belief that transferring the land to private ownership is not government endorsement. Rather, Stevens notes that transferring

[4] In recent years, justices have not frequently joined opinions unless they actually agree with what is written in the opinion. Therefore, though these two justices did not write the opinion, there is good reason to believe that these justices agree—at least in large part—with the content of the opinion.

the land to private ownership should still be seen as the government endorsing the cross since the assumed purpose of the transfer is to maintain the cross (*Salazar*, at 743). Similarly, he states, "Transferring the land…would perpetuate rather than cure the unambiguous endorsement of a sectarian message" (*Salazar*, at 759).

Greece v. Galloway (2014)

Like *Salazar,* the Court also reached an anti-claim decision by a 5-4 vote in *Greece v. Galloway* (2014). In this case, the Court ruled that the town of Greece, New York, did not violate the Establishment Clause by beginning monthly board meetings with prayer. More specifically, the town began board meetings with prayers led by local religious leaders, and only Christian leaders were invited to lead the prayers. Though the Court had previously upheld, in *Marsh v. Chambers* (1983), a legislature's right to prayer, the fact that only a single religious view was represented in *Greece* distinguished this case from the earlier case. The voting blocs were the same in this case as in the *Salazar* case with the exception of Kagan replacing Stevens among the dissenters. The five most devout Catholic justices—Scalia, Thomas, Roberts, Alito, and Kennedy—voted anti-claim, while the three Jewish justices and Sotomayor voted pro-claim.

Once again, Justice Kennedy wrote the majority opinion for the Court. Kennedy argues that the fact that Christian, sectarian prayer was exclusively used to open up the meetings is not in violation of the Establishment Clause. He writes, conversely, "An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases" (*Greece*, at 1820). In fact, according to Kennedy, the respondent's claim that the town must force prayer givers to give nonsectarian prayers would, in itself, be a violation. He writes, "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy" (*Greece*, at 1822). Furthermore, he states, "Once it invites prayer into the public

sphere, government must permit a prayer giver to address his or her own God or gods as a conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian" (*Greece*, at 1822). Finally, true to Kennedy form, he mentions that, even if some individuals are offended by Christian prayer, this—in and of itself—does not count as coercion (*Greece*, at 1826). (This belief is affirmed by Thomas in his concurring opinion.) As a whole, Kennedy simply believes that the government was not in violation of the Establishment Clause because it was not coercing anyone in prayer and—though it did invite religious leaders to lead prayers at public meetings (and exclusively Christian leaders)—it was not endorsing religion because it was not instructing the prayer givers on what to pray or how to pray; the mere act of inviting religious leaders—even if they are all of the same religion—to lead prayer does not constitute a violation of the Establishment Clause.

While those in the majority are not bothered by the fact that only a single religion was represented in the prayers at the public meetings, this is certainly an important factor for the dissenting justices. Justice Breyer, for instance, in his dissenting opinion, writes, "[T]he fact that nearly all of the prayers given reflected a single denomination takes on significance. That significance would have been the same had all the prayers been Jewish, or Hindu, or Buddhist" (*Greece*, at 1840). Interestingly, Kagan says almost the exact same thing in her dissenting opinion. Like Breyer, she also takes special care to mention that having only one religion represented through prayers at these meetings violates the Establishment Clause—regardless of the religion (*Greece*, at 1843). Kagan appears particularly concerned with ensuring that no single religion is favored over another. She writes, "In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans…That is what it means to be an equal citizen, irrespective of religion" (*Greece*, at

1851). As a whole, the dissenters believe the government acted in such a manner as to effectively endorse religion in the town of Greece.

Explanations for Voting Behavior in Establishment Clause Cases

Figure 2 provides a nice breakdown of the voting patterns for Establishment Clause cases during the Roberts Court. From this visual, it is clear that the voting blocs—with the exception of Kagan replacing Stevens in the second case—are exactly the same in both cases. The five most devout Catholic justices vote that there is no violation of the Establishment Clause while the Jewish justices and Sotomayor, the least devout Catholic, (and Stevens in one case) vote in favor of the claim that there was a violation of Establishment Clause in both cases.

	Pro-Claim Votes	Anti-Claim Votes	% of Votes Pro-Claim
Ginsburg	11	0	100%
Sotomayor	2	0	100%
Kagan	2	0	100%
Breyer	9	2	81.82%
Kennedy	3	8	27.27%
Scalia	1	10	9.09%
Thomas	1	10	9.09%
Alito	0	2	0%
Roberts	0	2	0%

Table 1: This table shows the voting behavior of justices for all Establishment Clause cases since 1994 (the year Breyer joined the Court). Justices in red have not voted in 100% of the cases. Only justices from the 2015-2016 Court are included.

Due to the relatively small sample of Establishment Clause cases during the Roberts Court, I have tallied the votes made by justices in all Establishment Clause cases since 1994. (See Table 1 above.) This provides a more complete perspective on the voting behaviors of the five justices who served between 1994, when Breyer joined the Court, and 2005, when Roberts joined the Court. Expanding the sample size to include earlier cases confirms the voting pattern as seen during the Roberts Court: the most devout Catholic justices are much more likely to vote anti-claim, and the Jewish justices (and Sotomayor) are much more likely to vote pro-claim.

Ideology itself may be helpful in explaining the voting pattern seen in Establishment Clause cases. In these cases, pro-claim votes are traditionally viewed as liberal votes, and anti-claim votes are traditionally considered conservative. Therefore, based on ideology alone, it is not surprising that the four liberal justices (who happen to be the three Jews and the least devout Catholic) are much more likely to vote in a pro-claim direction than in an anti-claim direction. Conversely, based solely on ideology, it is expected that the five more conservative justices (who happen to be the most devout Catholics on the Court) would be much more likely to vote in an anti-claim direction. However, if religion truly does play a role in influencing ideology (as is suggested earlier in this thesis), religion may implicitly influence the votes of justices in these cases even if the voting patterns can be explained simply in terms of ideology.

Beyond ideology, religious affiliation may also play a role in shaping the voting pattern in these cases. Given the prevalence of Christianity, in general, and Catholicism, in particular, in the United States and the lack of membership of other religions in the United States—relative to Christianity—claims of violations of the Establishment Clause are almost guaranteed to be claims that government action is, in some way, working to make Christianity a government-established religion. In fact, in both Establishment Clauses cases heard by the Roberts Court, the claim was that government action was working to establish Christianity. Perhaps as Christians, the Catholic justices are simply likely to be unoffended by the alleged violations and, consequently, are less likely to be sympathetic toward the claims of violations. In contrast, the Jewish justices, as non-Christians, might be more offended by the alleged violations and, as a result, might also be more sympathetic to the claims. This certainly seems implicitly present in the language used within the opinions for the two Establishment Clause cases. In the *Salazar* case, for instance, both Kennedy and Alito are unoffended by the presence of a cross on public land; they simply act as if it is not an issue or concern given the cross's potential use for non-

religious significance. The dissenting opinion, conversely, notes that the religious meaning of the cross cannot be removed from the object.

Perhaps an even bigger factor than the issue of offense is the potential feeling of a threat (or a lack of this feeling) that justices may experience in Establishment Clause cases. Given the fact that Christianity, as a whole, and Catholicism, specifically, are so prevalent in the nation, Catholic justices are extremely unlikely to feel that their religion is at all threatened in Establishment Clause cases. As previously noted, this is the case, first of all, because any allegations of violations are likely to be allegations that Christianity is being favored[5]. However, even if an alleged violation involved a different religion, a Catholic justice is not likely to feel that the alleged violation threatens their religion due to the magnitude and scope of Catholicism. Conversely, Jewish justices, as members of a minority religion, are more likely to feel threatened by alleged violations since the allegations are likely to be that Christianity is being favored (and possibly at the expense of other religions or minorities). In this regard, the Jewish justices might view it as part of their role to prevent violations of the Establishment Clause as a means to protect their own religious minority and other minority religious groups. Similarly, Sotomayor, whose identity is largely shaped by her status as a racial minority, and not her religion, might be sympathetic to claims of Establishment Clause violations in an effort to protect minority groups and prevent a majority religion from being disproportionately favored. Interestingly, in her dissenting opinion in the *Greece* case, Kagan states that she would have reached the same decision regardless of which religion was being favored by the government action, including Judaism. The reality, however, is that it is highly unlikely that an alleged violation of the

[5] *County of Allegheny v. ACLU* (1989), interestingly, was an Establishment Clause case involving both Christianity and Judaism. Specifically, a nativity scene and a menorah were both on display on government property in Pittsburgh, PA. The Court ruled that the display of the nativity scene violated the Establishment Clause while the display of the menorah did not. This very well may relate to the potential threat of the establishment of Christianity relative to any potential threat caused by the establishment of another religion.

Establishment Clause will involve any minority religion; therefore, Kagan is able to write these words without having to legitimately consider how she would vote if a hypothetical case actually came into existence. As a result, religious affiliation may indeed have been a factor for the dissenters in this case.

With regard to Establishment Clause cases, both ideology and religious affiliation may offer explanations for the voting behavior of justices. There are two implicit manners through which religion may influence decisions in Establishment Clause cases. First, religion may influence ideology; if this is the case, religion implicitly influences decision making even if decisions can be explained ideologically. In addition, a justice's religious affiliation might cause them to feel threatened or offended by certain allegations of Establishment Clause violations and, thus, implicitly influence their decisions. It would be interesting to see how the justices would rule in cases in which Christianity was not involved, but, due to the prevalence of Christianity in the U.S., it is highly unlikely that such a case will arise; therefore, it is difficult—if not impossible—to determine the exact role that religion plays in shaping voting patterns for Establishment Clause cases. Regardless, it is at least possible that religion does, in fact, play a role in influencing Supreme Court decision making with regard to these cases.

Free Exercise of Religion

After stating, "Congress shall make no law respecting an establishment of religion," the First Amendment continues with the Free Exercise Clause: "or prohibiting the free exercise thereof." As seen in Figure 3 (below), the Roberts Court has heard five cases pertaining to the Free Exercise clause or to federal statutes concerning the exercise of religion. These statutes are the Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and

Institutionalized Persons Act of 2000 (RLUIPA)[6]. I have selected a few of the cases that provide a firm understanding of how the justices approach cases pertaining to this issue to analyze qualitatively.

	Ali	Rob	Tho	Sca	Ken	Gin	Bre	Ste	Sou	Kag	Sot	
Hosanna-Tabor (2012)	P*	**P**	P*	P	P	P	P			P	P	9-0 (pro-claim)
Hobbs (2015)	**P**	**P**	P	P	P	P*	P			P	P*	9-0 (pro-claim)
Gonzales (2006)		**P**	P	P	P	P	P	P	P			8-0 (pro-claim)
Hobby Lobby (2014)	**P**	P	P	P	P*	**A**	A			A	A	5-4 (pro-claim)
Hastings (2010)	**P**	P	P	P	A*	**A**	A	A*			A	5-4 (anti-claim)

Figure 3: A Guttman scale of free exercise cases during the Roberts Court. "P" signifies a pro-claim vote, meaning a vote in favor of a claim that the Free Exercise Clause, RFRA, or RLUIPA was violated. "A" signifies an anti-claim vote, meaning a vote not in favor of the claim that there was a violation of the right to the free exercise of religion. A letter in bold signifies that the justice wrote the majority opinion in the case. An asterisk indicates that the justice wrote either a concurring opinion or a dissenting opinion. Only the first three letters of justices' last names are listed. Justices Stevens and Souter are in red because they are not members of the 2015-2016 Court. A black box means that the justice did not vote in the corresponding case.

Hastings Christian Fellowship v. Martinez. (2010)

In *Hastings Christian Fellowship v. Martinez* (2010), the Court reached an anti-claim decision by a 5-4 vote, meaning that the Court ruled that there was no violation of the Free Exercise Clause. This case involved an "all-comers" policy at the University of California, Hastings College of Law. According to this nondiscrimination policy, a student group at the law school needs to allow all students to participate and become members—regardless of beliefs—in order to be recognized officially as a registered student organization (RSO). RSO status confers benefits, such as financial assistance, increased modes of communication, and increased access to student recruitment resources, upon student groups. In its bylaws, the Christian Legal Society at Hastings (also known as Hastings Christian Fellowship) excludes non-Christians and individuals who participate in homosexual activity. As a result of this, the law school withheld

[6] Congress passed RLUIPA in response to the Court's ruling in *City of Boerne v. Flores* (1994), in which the Court ruled that RFRA was unconstitutional in its application to the states ("ACLJ Memorandum").

RSO status—and its associated benefits—from the Christian student group. In this case, the four most devout Catholic justices (Scalia, Thomas, Roberts, and Alito) voted pro-claim, meaning they voted in favor of Hastings Christian Fellowship's claim that the public law school violated the Free Exercise Clause. The two Jewish justices (Ginsburg and Breyer), the lone Protestant (Stevens), and the least devout Catholic (Sotomayor) voted anti-claim, meaning they found that there was no constitutional violation. Despite voting pro-claim in every other Free Exercise case heard during the Roberts Court—along with the four most devout Catholics—Justice Kennedy voted anti-claim in this decision.

The two sides seem to disagree over whether the Hastings Christian Legal Society was targeted specifically due to its Christian affiliation. In her majority opinion, Ginsburg makes it explicit that the group was not being targeted for this reason. She states, "CLS's conduct—not its Christian perspective—is, from Hastings' vantage point, what stands between the group and RSO status" (*Hastings*, at 696). Justice Stevens, a Protestant, shares a similar sentiment in his concurring opinion. With regard to the law school's nondiscrimination policy, he writes, "Regardless of whether they are the product of secular or spiritual feeling, hateful or benign motives, all acts of religious discrimination are equally covered…There is, moreover, no evidence that the policy was adopted because of any reason related to the particular views that religious individuals or groups might have, much less because of a desire to suppress or distort those views" (*Hastings*, at 699-700). Among all of the justices involved in this case, it is perhaps most interesting that Justice Kennedy votes anti-claim despite voting pro-claim in all of the other Free Exercise cases. In his concurring opinion, he simply states, "[T]he policy applies equally to all groups and views" (*Hastings*, at 704). For all of the anti-claim voters, including Justice Kennedy, a key factor is that, in their views, Hastings' nondiscrimination policy applied to all student groups in the same manner. This alone was enough for these justices to vote anti-claim.

Conversely, the dissenting justices, the four most devout Catholics, disagree with the majority's finding that the law school's policy applied equally to all groups. In fact, the minority finds that the Christian Legal Society at Hastings was singled out primarily because it is a religious group. Justice Alito, for instance, in his dissenting opinion, writes, "[T]he policy singled out one category of expressive association for disfavored treatment: groups formed to express a religious message" (*Hastings*, at 724). It is clear that the views of the majority and the dissenters are almost exact opposites with regard to how equally (or unequally) the nondiscrimination policy applied across groups. Perhaps the most devout Catholics, as both Christians and strongly religious, are more likely than the Jewish justices or less devout Catholics to find a Christian group's rights to free exercise of religion to be violated.

Burwell v. Hobby Lobby (2014)

This case pertains to the Religious Freedom Restoration Act (RFRA). RFRA is a statute that states that federal government action that burdens the free exercise of religion must serve a compelling state interest and must also be the least restrictive means of serving that compelling interest. This case was decided by a 5-4 vote in a pro-claim direction. The Court ruled in favor of the claim that there was a violation of RFRA; in other words, the Court ruled that the government action restricting the free exercise of religion did not serve a compelling interest. The government action in this case was the requirement placed on employers by the federal government to provide health insurance coverage for contraception regardless of the religious beliefs of the employer. Hobby Lobby, which is owned by Christians who view the use of certain types of contraception as conflicting with their religious views, raised the claim of a statutory violation. The five most devout Catholics (Scalia, Thomas, Roberts, Alito, and Kennedy) all voted pro-claim. The three Jewish justices and Sotomayor voted anti-claim.

For the majority, the requirement placed on employers to provide health insurance for contraception to employees—even if this violates their religious views—is a violation of RFRA and the right to the free exercise of religion. Alito, in his majority opinion, states that the government action "imposes a burden on the exercise of religion" for Hobby Lobby (*Hobby Lobby*, at 2770). For the devout Catholics of the majority, the government's interest in requiring employers to provide coverage of contraception for employees does not justify this reduction in the free exercise of religion. In his concurring opinion, Justice Kennedy, adds, "Free exercise…implicates more than just freedom of belief…It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community" (*Hobby Lobby*, at 2785). It appears that these Catholic justices are primarily concerned with the free exercise rights of employers without focusing much attention on employees in this case. For these justices, the government action significantly burdens the free exercise of religion of employers; therefore, there is a free exercise violation under RFRA.

While the majority seems focused on the potential harm to employers resulting from government action, the dissenters seem more focused on the potential harm to employees resulting from no government action. For instance, in her dissenting opinion, Justice Ginsburg writes, "In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby" (*Hobby Lobby*, at 2787). She goes on to state, "Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of these corporations commonly are not drawn from one religious community" (*Hobby Lobby*, at 2795). In contrast to the majority, which

focuses on the free exercise rights of the Christian employer, the dissenters appear to give precedence to the rights of employees who may not share the religious beliefs of the employer. Therefore, it seems that the dissenters are concerned with protecting the rights of employees of religious minorities (non-Christians). Beyond this focus on employees, as opposed to employers, the dissenters also seem, simply, to think that the government action does not actually apply a significant burden on employers. Ginsburg states, for instance, that employers are not required to directly purchase contraceptives for employees and that this reduces the burden placed on employers (*Hobby Lobby*, at 2799).

Holt v. Hobbs (2015)

Like the previous case, *Holt v. Hobbs* (2015) applies to a federal statute that pertains to the free exercise of religion. In this case, the statute is the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Similar to RFRA, RLUIPA prohibits any state or local government action that significantly burdens the free exercise of religion unless the action serves a compelling government interest and is the least restrictive means of carrying out that interest. The Court reached a unanimous decision in which all six Catholics and all three Jews voted pro-claim. Once again, this means that they voted in favor of the claim that there was a violation of free exercise rights as protected by RLUIPA. Specifically, the Court ruled that preventing a Muslim inmate from growing a ½ inch beard—which is required by his religion—violates RLUIPA.

Once again, Alito wrote the majority opinion for the Court. He notes that the government has a legitimate and compelling interest in attempting to prevent the flow of contraband within prisons; however, he also notes that preventing the inmate from growing a short beard does not serve this interest. In his words, "[T]he argument that this interest would be seriously compromised by allowing an inmate to grow a 1/2-inch beard is hard to take seriously" (*Hobbs,*

at 863). In reaching her pro-claim vote in this case, Ginsburg compares the facts of this case to the facts of the *Hobby Lobby* case. In her concurring opinion, she notes, "Unlike the exemptions this Court approved" in the *Hobby Lobby* case, "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief" (*Hobbs*, at 867). As in the *Hobby Lobby* case, Ginsburg is concerned with the broader effect of ruling in favor of a statutory violation. In this case, she determines that finding such a violation will not have the broader consequence of affecting others beyond the petitioner. It seems, though, that the simple fact that the government action does not contribute to the compelling government interest is enough to get all of the Catholics and Jews to vote pro-claim.

Explanations for Voting Behavior in Free Exercise of Religion Cases

Figure 3 visually shows the voting patterns for all of the Free Exercise cases heard by the Roberts Court. Unlike the Establishment Clause cases, the voting blocs are not consistent across cases. The four most devout Catholic justices—Scalia, Thomas, Roberts, and Alito—vote pro-claim in every case. The Jewish justices and Sotomayor, the least devout Catholic, split their votes, sometimes voting pro-claim and sometimes voting anti-claim. Though Justice Kennedy typically votes pro-claim, he, unlike the most devout Catholics, does not do so in all five cases.

Free Exercise Clause Cases			
	Pro-Claim Votes	Anti-Claim Votes	% of Votes Pro-Claim
Roberts	5	0	100%
Alito	4	0	100%
Scalia	6	1	85.71%
Thomas	6	1	85.71%
Kennedy	5	2	71.43%
Breyer	5	2	71.43%
Kagan	2	1	66.67%
Ginsburg	4	3	57.14%
Sotomayor	2	2	50%

Table 2: This table shows the voting behavior of justices for all Free Exercise cases since 1994 (the year Breyer joined the Court). Justices in red have not voted in 100% of the cases. Only justices from the 2015-2016 Court are included.

Table 2 shows all of the votes made by justices in free exercise cases since 1994. While there were only two free exercise cases between 1994, the year Breyer joined the Court, and 2005, the year Roberts joined the Court, expanding the time period back to 1994 still does increase the sample size slightly. It is clear that, though all of the justices vote pro-claim in at least 50% of free exercise cases, the devout Catholic justices are—on average—more likely to vote pro-claim than the less devout justices and the Jewish justices.

With regard to free exercise cases, ideology is not a very strong explanatory factor for the voting behavior of justices. As in Establishment Clause cases, pro-claim votes are typically considered to be liberal votes in free exercise cases while anti-claim votes are viewed as conservative. In free exercise cases, however, the votes are almost exactly the opposite of what would be expected based purely off ideology. In these cases, the more conservative justices are more likely to vote pro-claim (in a liberal direction) than the more liberal justices. This suggests that ideology alone may not serve as an explanation for the voting patterns in free exercise cases.

Religion—particularly religious affiliation—likely serves as a better explanatory factor with regard to free exercise cases. The four most devout Catholics vote pro-claim in every case

heard during the Roberts Court. In four of these cases, they are in the majority. In the lone case in which they are in the minority (Hastings), there is a discrepancy over whether Christians are explicitly targeted or not, and these four individuals determine that Christians—or at least religious groups—were being directly targeted. Based off of this, it is possible that these Catholics, given their devoutness, are sympathetic toward free exercise claims brought by Christian groups. They might vote pro-claim in order to protect their own religion's right to free exercise. From here, they might be inclined to vote pro-claim in cases involving other religious groups so as not to appear biased (which, in theory, would increase the legitimacy of the Court), or they might protect other religious groups' free exercise rights in the hopes that this would decrease the risk that the free exercise rights of their own religion would be challenged.

While the explanation provided in the previous paragraph is theoretically possible, a more likely explanation, given the fact that these devout Catholic justices vote consistently in a pro-claim direction, is that the Jewish justices—whose votes differ from case to case—alter their votes based on who is bringing the claim of a violation of free exercise rights. All of the Jewish justices vote pro-claim in every case when the claim of a violation is brought by a non-Christian religious group or individual. Worded differently, the Jewish justices vote pro-claim every time the claim is brought by an individual or group from a minority religion. For instance, in the *Hobbs* case, the claim is brought by a Muslim individual, and the Jewish justices vote pro-claim. Similarly, in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* (2006), the claim was brought by a small religious sect with approximately 130 members in the U.S., and the Jewish justices vote pro-claim[7]. Conversely, in both the *Hobby Lobby* and *Hastings* cases, the claims of violations were brought by Christians (non-minority religion groups or individuals), and the

[7] The religious group in this case identifies as a Christian Spiritist group, but its practices differ significantly from mainstream Christian practices.

Jewish justices voted anti-claim. In fact, the only case during the Roberts Court in which a Christian group raised a claim and the Jewish justices voted pro-claim is *Hosanna-Tabor v. EEOC* (2012), and this case involved a conflict between an individual and a specific Christian denomination, as opposed to a conflict between an individual and government action in the other cases. Given the voting behavior of the Jewish justices, it is quite possible (and maybe even likely) that Jewish justices—given their status as members of a minority religion—are more sympathetic toward free exercise claims brought by minority religions (non-Christians) and less sympathetic toward claims brought by Christians. This is consistent with Justice Ginsburg's stated belief that being a Jew has taught her what it means to be a minority. Additionally, this is consistent with Ginsburg's apparent concern for employees (many of whom are likely members of minority religious groups) in the cases even when the claim itself is brought by a Christian employer. In essence, the Jewish justices may feel some sort of obligation to protect minority religious groups in a way that is different than the Catholic justices. It is also possible that the Jewish justices, being more liberal, have a vested interest in promoting equality. They might, if this is true, promote equality through favoring free exercise claims brought by non-Christians and not favoring claims brought Christians. Even if this is the case, religion, of course, may play a role in the Jewish justices' liberal ideological preferences and affinity for equality, and, therefore, religion may implicitly play a role in the voting behavior of Jewish justices. Thus, religion may implicitly influence decisions in free exercise cases either by influencing ideology or, more likely, through conferring minority status on some justices and not others. Either way, it appears that religion likely does play a role in the votes made by justices in free exercise cases.

Based on the discussion so far, there are still two irregularities in the voting patterns: Justice Sotomayor's votes and Justice Kennedy's vote in the *Hastings* case. Sotomayor's voting behavior is easy to explain. As noted in an earlier section, Sotomayor is not at all religiously

devout, and her Latina race has a much greater influence on her identity than does her Catholic religion. As a racial minority, she likely shares the Jewish justices' desire to protect minority religious groups and/or promote equality. Justice Kennedy's voting behavior is not necessarily as easy to explain. Of the five free exercise cases heard by the Roberts Court, he votes with the devout Catholic justices in all but one of the cases, the *Hastings* case. His deviation from the other devout Catholics in this case can likely be explained by the fact that he interpreted the facts of this case differently than the other Catholic justices. While the majority of the Catholic justices thought the student group was being targeted specifically because of their religious affiliation, Justice Kennedy, in his opinion, makes it clear that he thought the nondiscrimination policy applied uniformly across all student groups. In cases in which it seems that Christian groups or individuals are being more directly targeted (and, consequently, where there is probably less ambiguity over the facts of the case), such as the *Hobby Lobby* case, Kennedy joins the most devout Catholic justices in voting pro-claim.

Summary of Establishment Clause and Free Exercise Cases

Free Exercise Clause Cases			
	Pro-Claim Votes	Anti-Claim Votes	% of Votes Pro-Claim
Roberts	5	0	100%
Alito	4	0	100%
Scalia	6	1	85.71%
Thomas	6	1	85.71%
Kennedy	5	2	71.43%
Breyer	5	2	71.43%
Kagan	2	1	66.67%
Ginsburg	4	3	57.14%
Sotomayor	2	2	50%

Establishment Clause Cases			
	Pro-Claim Votes	Anti-Claim Votes	% of Votes Pro-Claim
Ginsburg	11	0	100%
Sotomayor	2	0	100%
Kagan	2	0	100%
Breyer	9	2	81.82%
Kennedy	3	8	27.27%
Scalia	1	10	9.09%
Thomas	1	10	9.09%
Alito	0	2	0%
Roberts	0	2	0%

Tables 3 and 4: These tables show the voting behavior for all justices for all free exercise and Establishment Clause cases since 1994. Justices in red did not participate in 100% of the cases. Only members of the 2015-2016 Court are included.

The devout Catholic justices vote pro-claim more often than the Jewish justices (and Sotomayor) in free exercise cases, but they vote pro-claim less often than the Jewish justices

(and Sotomayor) in Establishment Clause cases. (See Tables 3 and 4 above). Furthermore, all of the conservative justices (the five most devout Catholic justices) vote pro-claim significantly more frequently in free exercise cases than in Establishment Clause cases. Conversely, all of the liberal justices (the three Jewish justices and Sotomayor) vote pro-claim more often in Establishment Clause cases than in free exercise cases. While ideology may play a role in determining the votes of justices in these cases, it does not appear that ideology alone can explain the voting patterns in these cases.

The finding that religion may be influential in shaping Supreme Court decisions in cases pertaining to religion is consistent with previous research on the subject. Baum, for instance, looks at Free Exercise cases involving "mainstream" (mainline Protestant, Roman Catholic, and Jewish) and "non-mainstream" (other) religious groups. Though, in his case, Judaism is considered mainstream, his findings ultimately suggest that religion of litigants plays a role in determining how justices vote in cases pertaining to religion. He finds, for instance, that in free exercise cases involving mainstream religious groups, the cases were divided evenly between cases in which the justices who voted "pro-religion" were more liberal and cases in which the justices who voted pro-religion were more conservative. In contrast, in almost every case involving non-mainstream groups, the justices who voted pro-religion were more liberal than their colleagues. Baum's approach to looking at mainstream and non-mainstream litigants is slightly different than my use of Christian and minority (non-Christian) litigants, and he looks exclusively at the ideologies of justices (and not at the religious affiliations of the justices); nonetheless, his research provides further support that religion—at least the religious affiliations of litigants—is a considerable factor in influencing voting patterns in cases pertaining to religion. This section has built off Baum's work by considering the religious affiliations of justices and also litigants.

As it pertains to Establishment Clause and free exercise cases, religion is not a perfect explanatory variable; as in other cases, justices consider many factors when making their decisions. Nonetheless, religion is useful in helping to explain how justices vote in these cases, and it provides a nice supplement to just ideology. With regard to Establishment Clause cases, religion may influence ideology and, consequently, indirectly influence voting behavior. Furthermore, religion may play a role by making the Jewish justices and Sotomayor (a racial minority defined by her race) more sympathetic toward claims of Establishment Clause violations, as these claims are systematically much more likely to be raised against Christianity and not against minority religious groups. It appears that religion plays an even greater role in influencing justices in free exercise cases due to the fact that ideology alone cannot explain the voting patterns in these cases. Rather, it is at least possible that religious affiliation influences the outcomes of these decisions, as the Jewish justices only vote pro-claim when the claim is raised by a minority religious group whereas the devout Catholics (for the most part) vote pro-claim in every case. In conclusion, religion may provide a clearer and more complete understanding of the voting behavior of justices in both Establishment Clause and free exercise cases.

Cases not Pertaining Directly to Religion

In American society, there are numerous issues that do not directly pertain to religion, yet views on many of these issues are strongly shaped by religious attitudes and preferences. Abortion, the death penalty, and gay marriage are three issues for which individuals' perspectives are often linked to their religious affiliations and religiosity. Therefore, in this section, I will analyze the role that religion plays in influencing the Supreme Court's decisions in these cases.

Abortion

Within the past few decades, abortion has become a very salient political issue in American society. In addition, it is an issue for which individuals' perspectives are largely influenced by religion. The Catholic Church teaches that human life begins at conception, and the Church is known for its strong moral opposition to abortion. The Catholic Catechism, for instance, states, "Since the first century the Church has affirmed the moral evil of every procured abortion. Direct abortion…is gravely contrary to the moral law." The Catechism goes on to say, "The Church attaches the canonical penalty of excommunication to the crime against human life." Judaism, in general, takes a less strong stance on the issue of abortion, in part because the religion places a higher precedence on the life of the mother than the life of the fetus. Orthodox Judaism, for instance, generally prohibits abortion but would consider it mandatory in order to save a mother's life (Weisberg). Reform Judaism takes an even weaker stance on abortion, permitting a woman the right to make her own decision, though this denomination of Judaism still does not consider the decision a light one (Weisberg).

	O'Co	Ste	Sou	Gin	Bre	Sca	Ken	Tho	Rob	Ali	Sot	Kag	
Ayotte (2006)	**P**	P	P	P	P	P	P	P	P				9-0 (pro-claim)
Carhart (2007)		P	P	P*	P	A	**A**	A*	A	A			5-4 (anti-claim)
Scheidler (2006)		A	A	A	A*	A	A	A	A				8-0 (anti-claim)
Coakley (2014)**				A	A*	A*	A	A	**A**	A*	A	A	9-0 (anti-claim)

Figure 4: A Guttman scale of abortion cases during the Roberts Court. "P" signifies a pro-claim vote, meaning a vote in favor of a claim of a constitutional violation. "A" signifies an anti-claim vote, meaning a vote not in favor of the claim that there was a constitutional violation. A letter in bold signifies that the justice wrote the majority opinion in the case. An asterisk indicates that the justice wrote either a concurring opinion or a dissenting opinion. Only the first three letters of justices' last names are listed. Justices O'Connor, Stevens, and Souter are in red because they are not members of the 2015-2016 Court. Black boxes means the justice did not vote in the corresponding case.

The Roberts Court has heard only four cases on abortion. From the Guttman scale pictured above, it would seem that the justices largely share similar views on abortion given the

fact that three of the four cases were unanimous decisions. In reality, however, these four abortion cases contain both First Amendment free speech cases (cases involving, for instance, people protesting at abortion clinics) and regulation of abortion cases; therefore, some of these cases might reflect justices' attitudes toward free speech more than the justices' attitudes toward abortion.

Gonzales v. Carhart (2007)

Of the four abortion cases heard by the Roberts Court, *Gonzales v. Carhart* (2007) is the only split decision. As a result, this case is particularly useful in analyzing the justices' perspectives on abortion. In this case, the Court reached a 5-4 anti-claim decision, meaning that the Court ruled that the legislation in question, which regulated abortion, did not unduly burden women's rights to an abortion and, therefore, did not violate the Constitution. In this case, the five Catholic justices (Scalia, Thomas, Roberts, Alito, and Kennedy) voted anti-claim while the two Jewish justices (Breyer and Ginsburg) and the two Protestant justices (Stevens and Souter) voted pro-claim. In this case, the Court upheld the Partial Birth Abortion Act of 2003, which prohibited so-called "partial-birth" abortions.

Anthony Kennedy wrote the majority opinion for the Court. Justice Kennedy begins his opinion by providing a very technical and scientific description of the process of a partial-birth abortion. Upon completing this description, he writes, "[A] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion…is a gruesome and inhumane procedure that is never medically necessary and should be prohibited" (*Carhart*, at 141). Quoting Congress and referring to partial-birth abortions, he goes on to state, "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life" (*Carhart*, at 157). The majority is

clearly focused on the moral concerns associated with partial birth abortions. While these justices may have a legal rationale for reaching their decision, they do not shy away from addressing the morality of partial-birth abortions and from using morality as a means for condemning such abortions.

In her dissenting opinion, Ginsburg begins by emphasizing the autonomy of women to make decisions. She eventually transitions to address the majority's rationale for its anti-claim decision. She notes, "Ultimately, the Court admits that 'moral concerns' are at work, concerns that could yield prohibitions on any abortion…Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent" (*Carhart,* at 183). Essentially, she calls out the five justices in the majority for using moral concerns as a primary justification for their decision.

McCullen v. Coakley (2014)

In *McCullen v. Coakley* (2014), the Court heard a First Amendment free speech case relating to abortion. The Court ultimately ruled that a Massachusetts law that created a buffer zone outside of abortion clinics in which citizens could not engage in free speech violates the right to free speech as protected in the First Amendment. The buffer zone was set up in such a way so as to prevent individuals who oppose abortion from talking to women as they approached abortion clinics. Despite this unanimous decision, differences in values and beliefs nonetheless surface in this case. This is most notable in Scalia's concurring opinion, where he voices his displeasure that at least part of the majority opinion, in his eyes, is "favorable to advocates of abortion rights" (*Coakley,* at 2543). Specifically, Scalia's concern is due to the majority's apparent encouragement to Massachusetts to pass legislation prohibiting people from harassing women as they approach abortion clinics. For Scalia, the majority's association of protesting

abortion with "harassment" is unwarranted and favorable to those who advocate for abortion (*Coakley*, at 2543). Thus, even in the midst of a unanimous decision, there is a divide among the justices.

Explanations for Voting Patterns in Abortion Cases

Since there are not very many abortion cases to analyze, it is difficult to make firm conclusions about the role that religion plays in determining the outcomes of these cases. Qualitatively analyzing the *Carhart* and *Coakley* cases, however, does provide insight into the role religion might play in abortion cases. It does appear that, in general, the religious affiliations of justices may have an impact on how they interpret abortion cases.

In particular, religious affiliation likely determines the moral lens through which justices view cases on abortion. This is most evident in the *Carhart* case, in which the majority opinion largely uses moral arguments to justify their decision to uphold the ban on partial-birth abortions. The strong moral opposition of the majority—composed of the five most devout Catholic justices—to abortion reflects the Catholic Church's strong opposition to abortion. In contrast, the dissenters—of whom there are no Catholics—do not consider the potential immorality of abortion; rather, they take offense with the fact that the Catholic justices in the majority use morality as a key determinant of the decision. This suggests that the Catholic justices—as members of a Church that is strongly and publicly opposed to abortion—may have an interest in preventing the reach of what they view as a sinful act while the other justices—who are not members of a religious institution that strongly opposes abortion—may not share these sentiments about the immorality of abortion and, consequently, do not share this interest in prohibiting abortion. This idea is further supported by Scalia's dissenting opinion in the *Coakley* case. Though the Court ultimately reached what would normally be considered a conservative decision with regard to the First Amendment issue in question, Scalia still felt the need to voice

his dissatisfaction with the fact that he believed the majority opinion favored pro-abortion beliefs. Given the devoutness of Scalia's Catholicism, his personal views on abortion probably resembled the Catholic Church's stance very closely; as a result, it may have been difficult for Scalia (and some of the other devout Catholics) to watch the Court possibly advocate for—or permit—abortion.

Due to the small sample size of abortion cases heard in recent decades, it is somewhat difficult to analyze the role that religion plays in influencing voting behavior in these cases. This issue is further complicated by the fact that the abortion cases contain cases pertaining to both First Amendment free speech violations and to cases actually pertaining to the regulation of abortion. Despite these challenges, it is still possible to detect at least a small religious influence in cases on this policy issue. The use of moral language, in particular, in the opinions of the Catholic justices reflects legitimate moral concerns about abortion, concerns that mirror the Catholic Church's official beliefs. Conversely, the relative lack of moral concern by the non-Catholics and non-devout Catholic more closely resembles the religious affiliations of these justices, which, broadly, are less morally opposed (if opposed at all) to abortion than the Catholic Church. Thus, religion likely plays an explicit role in shaping decisions in abortion cases as the votes of the justices largely resemble the positions of their religious affiliations.

Death Penalty

Like abortion, the death penalty is another issue about which views are frequently shaped by religious beliefs. In particular, the death penalty's implications for conceptions of justice and conceptions of the humane treatment of individuals yield itself to being an issue that is relevant to religion. In *Evangelium Vitae*, Pope John Paul II officially stated that the Catholic Church opposes the death penalty (Murphy 286). The Catholic Church opposes the death penalty except in instances where it is deemed necessary for the protection of human lives, and Pope Francis has

largely opposed the death penalty (Lipka). With regard to Judaism, both the Conservative and Reform denominations formally oppose the death penalty, and the Orthodox denomination has called for a moratorium on the issue (Lipka). In general, it seems that both Catholicism and Judaism oppose the death penalty. Since 2005 (the beginning of the Roberts Court), the Supreme Court has heard 11 death penalty cases. These cases typically involve claims that the Cruel and Unusual Punishments clause was violated. Though there are a significant number of cases, I have selected a sample of them that provides an overall outlook on the death penalty cases to analyze in greater depth.

	Kag	Sot	Sou	Gin	Bre	Ste	Ken	Rob	Tho	Sca	Ali	O'Co	
Smith v. Texas (2007)			P	P	P	P	**P**	A	A	A	A*		5-4 (pro-claim)
Quarterman (2007)			P	P	P	P	**P**	A	A*	A	A		5-4 (pro-claim)
Kennedy v. Louisiana (2008)			P	P	P	P	**P**	A	A	A	A*		5-4 (pro-claim)
Hall v. Florida (2014)	P	P		P	P		**P**	A	A	A	A*		5-4 (pro-claim)
Sanders (2006)			P*	P	P*	P	A	A	A	**A**		A	5-4 (anti-claim)
Marsh (2006)			P*	P	P	P*	A	A	**A**	A*	A		5-4 (anti-claim)
Belmontes (2006)			P	P	P	P*	**A**	A	A	A*	A		5-4 (anti-claim)
Gross (2015)	P	P*		P	P*		A	A	A*	A*	**A**		5-4 (anti-claim)
Rees (2008)			P	**P**	A*	A*	A	**A**	A*	A*	A*		7-2 (anti-claim)
Guzek (2006)			A	A	**A**	A	A	A	A	A*			8-0 (anti-claim)
Spiask, Jr. (2010)		A		A	**A**	A*	A	A	A	A	A		9-0 (anti-claim)

Figure 5: A Guttman scale of death penalty cases during the Roberts Court. "P" signifies a pro-claim vote, meaning a vote in favor of a claim that there was a constitutional violation. "A" signifies an anti-claim vote, meaning a vote not in favor of the claim that there was a constitutional violation. A letter in bold signifies that the justice wrote the majority opinion in the case. An asterisk indicates that the justice wrote either a concurring opinion or a dissenting opinion. Justices in red are not members of the 2015-2016 Court. A black box means the corresponding justice did not vote in the case.

Kansas v. Marsh (2006)

In this case, the Court reached a 5-4 anti-claim decision, meaning the Court ruled that the statute involved did not violate the Constitution. In particular, the Court was considering the constitutionality of a Kansas statute that requires an individual who is found guilty of a crime punishable by death, and in which the aggravating and mitigating evidence are found to be in equipoise, be sentenced to death. In this case, the five Catholic justices (Scalia, Thomas,

Kennedy, Roberts, and Alito) voted to uphold the statute while the two Jewish justices (Ginsburg and Breyer) and the two Protestant justices (Souter and Stevens) found the statute to be unconstitutional.

The majority opinion—written by Justice Thomas—and Scalia's concurring opinion provide the greatest insight into some of the justices' attitudes toward this issue. Justice Thomas writes, "Because the criminal justice system does not operate perfectly, abolition of the death penalty is the only answer to the moral dilemma the dissent poses. This Court, however, does not sit as a moral authority" (*Marsh*, at 181). This statement nearly perfectly resembles the thoughts expressed in Thomas's dissenting opinion in *Panetti v. Quarterman* (2007), another death penalty case. Here, Thomas writes, with reference to the majority opinion (which was an anti-death penalty decision), "[T]he Court's decision today—setting upon a preferred outcome without resort to the law—is foreign to the judicial role as I know it" (*Panetti*, at 980). Justice Thomas expresses that the Court should not determine death penalty cases based upon morality, and he also explicitly calls out the opposition for their emphasis on morality in these cases. Though Justice Scalia does not mention morality, he furthers Thomas's thought by adding, in his concurring opinion, that justices must separate "what they personally approve or disapprove as a matter of policy" from their decisions (*Marsh*, at 186). He ultimately defers to the will of the American people, stating "The American people have determined that the good to be derived from capital punishment…outweighs the risk of error. It is no proper part of the business of this Court or of its Justices to second-guess that judgment" (*Marsh*, at 199).

Ayers, Jr. v. Belmontes (2006)

In this case, the Court reached a 5-4 anti-claim decision; the Court ruled that there was no violation of a defendant's right to protection from cruel and unusual punishment under the Eighth Amendment. This was a technical case over whether a judge's instructions to the jury

prevented certain mitigating evidence that was presented at trial from being considered by the jury. The Court determined that the jury was not prevented from considering the mitigating evidence, and the voting pattern was exactly the same in this case as in the *Marsh* case; however, the actual language used by Justice Kennedy's majority opinion is more telling than simply the voting pattern. The mitigating evidence in this case was that the defendant was a Christian and that he would, therefore, make positive contributions if he were sentenced to life in prison as opposed to the death penalty. In reference to this mitigating evidence, Kennedy writes, "[S]ome likelihood of future good conduct…tending to make a defendant less deserving of the death penalty" may be considered as mitigating evidence. "So, too, would it be counterintuitive if a defendant's capacity to redeem himself through good works could not extenuate his offense and render him less deserving of a death sentence" (*Ayers, Jr.*, at 15-16). It is possible that Kennedy's Catholicism may make him sympathetic toward including the possibility of future good conduct, when connected to Christianity, as mitigating evidence. Regardless, it is interesting to note that Kennedy still upheld the death penalty in this case, reflecting the same vote pattern that he and many of the other Catholic justices have in other death penalty cases.

Kennedy v. Louisiana (2008)

The Court, in this case, ruled 5-4 in favor of the claim that the Eighth Amendment was violated, meaning the Court reached a pro-claim decision. Specifically, the Court ruled that imposing the death penalty for child rape in cases in which the victim does not die violates the Eighth Amendment. The voting blocs were the same in this case as in the first two cases with the exception of Kennedy this time voting not to uphold the death penalty as it was applied in the context of this case.

Both the majority and the dissenters address the issue of morality as it concerns to the death penalty. In his majority opinion, for example, Justice Kennedy writes, "It must be

acknowledged that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death…We cannot dismiss the years of long anguish that must be endured by the victim of child rape…It does not follow, though, that capital punishment is a proportionate penalty for the crime" (*Kennedy*, at 435). Essentially, Kennedy directly acknowledges that there are moral concerns associated with prohibiting the death penalty in particularly heinous cases. Conversely, in his dissenting opinion, Justice Alito, much like Scalia in the *Ayers* case, expresses his belief that the majority uses policy preferences to reach their decision. He writes, "These policy arguments, whatever their merits, are simply not pertinent to the question whether the death penalty is 'cruel and unusual' punishment" (*Kennedy*, at 462). He also states that the majority ignores "a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court's 'own judgment' regarding 'the acceptability of the death penalty'" (*Kennedy*, at 461). Clearly, the four dissenters (the four most devout Catholic justices) are disappointed by what they perceive to be the other justices' use of moral concerns as a key justification for their decision in these death penalty cases.

Miller v. Alabama (2012)

While *Miller v. Alabama* (2012) is not a death penalty case (and, therefore, is not included in Figure 5), it nonetheless is a case on the Cruel and Unusual Punishments Clause, and the reasoning of the justices largely resembles the arguments displayed in the death penalty cases. Thus, this case assists in providing an understanding of how justices interpret death penalty cases. Once again, the Supreme Court, in this case reached a 5-4 pro-claim decision, meaning a decision in favor of the claim that the Eighth Amendment was violated. This time, the Court determined that the right to protection from cruel and usual punishment in the Eighth Amendment prohibits a mandatory minimum sentence of life without the possibility of parole for

juvenile homicide offenders. The three Jewish justices and Sotomayor and Kennedy voted pro-claim while the four most devout Catholic justices all voted anti-claim.

Beyond merely voting patterns, the language used in the opinions—particularly by Roberts and Thomas in their dissenting opinions—is useful for better understanding the perspective of the justices in these cases. In his dissenting opinion, Roberts articulates—as do many of his Catholic colleagues in earlier cases—his belief that the justices opposing the use of the death penalty are ignoring the desires of the American people and are, instead, basing their voting decisions off of their own policy preferences. He writes, "In recent years, our society has moved toward requiring that the murderer, his age notwithstanding, be imprisoned for the remainder of his life. Members of this Court may disagree with that choice…But this is not our decision to make. Neither the text of the Constitution nor our precedent prohibits legislatures from requiring that juvenile murderers be sentenced to life without parole" (*Miller*, at 2482). Importantly, despite articulating this viewpoint, Roberts nonetheless also acknowledges the "grave and challenging questions of morality and social policy" brought about by these Eighth Amendment cases (*Miller*, at 2477). For Roberts (and most of the other Catholics), there is a strong awareness of the moral concerns associated with the death penalty and mandatory minimum sentences; for these justices, however, these moral concerns do not provide a legitimate justification for ruling that the death penalty (or, in this case, a mandatory life sentence) violates the Eighth Amendment. For his part, Justice Thomas, in his dissenting opinion, sticking true to his originalist principles for constitutional interpretation, states that the majority's opinion is not "consistent with the original understanding of the Cruel and Unusual Punishments Clause" (*Miller*, at 2482). He, once again, also notes that the majority relies on "its own sense of morality" to reach its decision (*Miller*, at 2486).

Glossip v. Gross (2015)

At issue in *Glossip v. Gross* (2015) was the use of a particular drug for the purposes of lethal injection in the state of Oklahoma. By a 5-4 vote, the Court reached an anti-claim decision; the Court ruled that Oklahoma's lethal injection process does not violate the Cruel and Unusual Punishments Clause. The five most devout Catholics voted anti-claim while the three Jewish justices and Sotomayor voted pro-claim.

In his dissenting opinion in this case, Justice Breyer actually goes so far as to call for the Court to consider whether the death penalty, given the moral concerns, is even constitutional in any circumstances. Similarly, Sotomayor makes a moral appeal in which, while referring to the permitted use of the death penalty, states, "[W]e deserve to know the price of our collective comfort before we blindly allow a State to make condemned inmates pay it in our names" (*Glossip*, at 2797). Justice Scalia, the writer of a concurring opinion, vehemently disagrees with the approach taken by the dissenters. In what appears to be a direct response to Justice Breyer's dissenting opinion, Scalia writes, "Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled other controversial issues: they left it to the People to decide. By arrogating to himself the power to overturn that decision, Justice Breyer does not just reject the death penalty, he rejects the Enlightenment" (*Glossip*, at 2749). Furthermore, Scalia notes, "It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*" (*Glossip*, at 2747). For Scalia, the idea of even considering that the death penalty is unconstitutional is ridiculous due to its rich history in American life and the original meaning of the Constitution. While the Jewish justices (and Sotomayor) are concerned with the treatment of convicted inmates, Scalia expresses his concern for the families of victims, stating, "I would not presume to tell parents whose life

has been forever altered by the brutal murder of a child that life imprisonment is punishment enough" (*Glossip*, at 5). This perhaps suggests that not only must the treatment of inmates be considered but also the carrying out of justice via appropriate punishments.

Explanations for Voting Patterns in Death Penalty Cases

Cases since 1994			
	Pro-Claim Votes	Anti-Claim Votes	% of Votes Pro-Claim
Kagan	2	0	100%
Ginsburg	19	4	82.61%
Breyer	17	6	74%
Sotomayor	2	1	67%
Kennedy	9	14	39.13%
Scalia	1	22	4.35%
Thomas	1	22	4.35%
Alito	0	9	0%
Roberts	0	11	0%

Cases since 2005			
	Pro-Claim Votes	Anti-Claim Votes	% of Votes Pro-Claim
Kagan	2	0	100%
Ginsburg	9	2	81.82%
Breyer	8	3	73%
Sotomayor	2	1	67%
Kennedy	4	7	36.36%
Scalia	0	11	0%
Thomas	0	11	0%
Alito	0	9	0%
Roberts	0	11	0%

Tables 5 and 6: These tables show the voting behavior for all justices for all death penalty cases heard by the Court since Breyer joined the Court in 1994 (left) and since Roberts joined the Court in 2005 (right). Only Supreme Court justices from the 2015-2016 Court are included.

As is evident in the tables above, since Roberts joined the Court in 2005, the Jewish justices have been much more likely to vote pro-claim in death penalty cases than their Catholic counterparts. Expanding the sample size of cases to when Breyer joined the Court results in almost the exact same voting patterns for all justices. Going back to at least 1994, the Catholic justices have almost always voted anti-claim in death penalty cases. These results reveal that the Jewish justices (and Sotomayor) are much more likely to shoot down the death penalty by finding a constitutional violation whereas, in general, the Catholic justices are likely to not find a constitutional violation and, consequently, to uphold the use of the death penalty. The fact that the two groups exhibit very different voting patterns on cases pertaining to this issue is particularly interesting since, broadly, both religious groups oppose the use of the death penalty in at least most cases.

On one hand, the justices' voting behavior might be explainable on ideological grounds. In death penalty cases, pro-claim votes are typically seen as liberal, and anti-claim votes are conservative; therefore, the justices' voting pattern in death penalty cases aligns with ideology since the more liberal justices vote pro-claim substantially more often than the more conservative justices (and, as would be expected, Kennedy is in the middle).

In addition to ideology, there are several factors that might explain why a Catholic justice might be inclined to vote to uphold the death penalty despite the Catholic Church's official opposition to the death penalty. (While the following explanations might be helpful in understanding justices' votes, it cannot be proven that justices actually take these factors into account or that they influence decisions. It may be that, ultimately, ideology is the best explanation.) First and foremost, originalism as a principle for constitutional interpretation, particularly for the most devout and traditional Catholics (Scalia and Thomas), might incline these justices to uphold the death penalty. Both Scalia and Thomas, for instance, suggest that eliminating the death penalty is not consistent with the original meaning of the Constitution (especially the Eighth Amendment). If religion influences the formation of principles for constitutional interpretation—which it likely does for many of the justices, including Scalia and Thomas, then Catholicism might actually implicitly play a role in getting devout Catholic justices to vote in a manner that contradicts official Catholic doctrine. Additionally, for much of the Catholic Church's history, the Church condoned (or at least did not condemn) the death penalty. In fact, it was not until *Evangelium Vitae* in 1995 that Pope John Paul II officially changed the Catholic Church's stance on the issue. Traditional, pre-Vatican II Catholics, such as Scalia and Thomas, may be more likely to vote in a manner that reflects original Catholic teaching, resulting in votes that uphold the death penalty. In addition, the Catholic stance against the death penalty is considered an *ex cathedra* teaching. (*Ex cathedra* literally means "from the

chair," as in from the pope's chair.) Justice Scalia has suggested that, since this is an *ex cathedra* teaching, he doesn't have to actually follow the teaching as long as he critically considers it (Murphy 286). Finally, in Catholicism, there is a distinction between formal cooperation in sin (which is sharing the sinful intention of another) and material cooperation in sin (which is helping another to sin without sharing the sinful intention) (Hartnett 81). While formal cooperation in sin is never permitted, material cooperation may sometimes be allowed. Furthermore, while sentencing an individual to the death penalty may be considered formal cooperation in sin, merely upholding the death penalty as an appellate judge is material cooperation (Hartnett 85). While this does not necessarily explain why Catholic justices would choose to uphold the use of the death penalty in most cases, it does absolve these justices of moral responsibility in these cases.

Beyond the moral responsibility associated with formal and material cooperation in sin, both the Catholic and Jewish justices recognize that the death penalty is an issue that is deeply connected to moral issues. For the Jewish justices, the concern over morality connected to sentencing someone to the death penalty works to encourage these justices to vote pro-claim (or to not vote to uphold the death penalty). While acknowledging the moral concerns associated with the death penalty, the Catholic justices, in general, are quick to note that moral concerns alone should not be used to find particular uses of the death penalty to be unconstitutional. In addition, many of the Catholic justices seem to be concerned with the issue of morality of justice and appropriate punishments; for instance, some of these justices refer to the death penalty as a means of providing justice for the families of victims. More research may need to be conducted on the two religions' views on morality and on conceptions of justice, but, based on a qualitative analysis of the opinions, the Jewish justices are more concerned about the humane treatment of convicted inmates while the Catholic justices seem more interested in punitive justice.

In addition, the Catholic justices, in general, appeal significantly more frequently to allowing the American people—not the Supreme Court—to establish their own conceptions of morality than the Jewish justices (who do not really make such appeals in death penalty cases). This might relate to the minority/non-minority religious affiliation explanatory factor as seen in the cases pertaining directly to religion. Perhaps since there are such a large number of Christians, in general, and Catholics, specifically, in the U.S., the Catholic justices might be more comfortable appealing to public opinion of morality of the death penalty. Conversely, the Jewish justices might feel that their religious views—and, hence, their views on the morality of the death penalty—are underrepresented in the American population; therefore, they may be less inclined to make such appeals to the use of public opinion when ruling on death penalty cases.

Though Justice Kennedy votes with the devout Catholic justices in the majority of the cases, he votes pro-claim more frequently than these justices. Therefore, as is typical, Justice Kennedy serves as a bit of an anomaly. However, focusing on his affinity for human dignity—a likely product of his Catholicism—makes sense of his voting behavior. Of the five cases that are qualitatively analyzed, Kennedy votes with the devout Catholics three times. One of the cases in which Kennedy does not align with the devout Catholics involves a mandatory minimum sentence of life in prison for juvenile offenders, and the other case involves imposing the death penalty for a particular crime that does not result in the victim's death. Though Kennedy upholds the use of the death penalty (or, in the first case, mandatory minimum sentences) in a majority of cases, perhaps he views these punishments as being unjust and, consequently, as not appropriately recognizing the human dignity of the inmates. While he does not explicitly state this in his opinions, this would be consistent with Kennedy's views and would help explain his voting behavior.

As a whole, it is difficult to determine the exact role that religion plays in influencing justices' decisions in death penalty cases. Once again, ideology alone might be able to explain the justices' votes in death penalty cases; therefore, it is difficult to conclude that religion definitively influences decision making in these cases. Rather, the important takeaway is that religion possibly could influence justices' decisions in death penalty implicitly through its effect on ideology and principles for constitutional interpretations. There is, in fact, some evidence based on the language contained within opinions and on the voting patterns of justices that religious views might have an impact on death penalty cases Ultimately, however, few conclusions can be made about the exact mechanisms through which religion influences death penalty cases (if at all).

Gay Marriage

Gay marriage is another issue that has become politically salient in recent years, and, like abortion and the death penalty, views on gay marriage are often shaped by attitudes toward religion. Jewish attitudes toward gay marriage differ across denominations. The Orthodox Union, for instance, opposes the legalization of gay marriage while the Central Conference of American Rabbis (part of the Reform Judaism) has officially supported same-gender ceremonies since 2000, and Conservative synagogues typically leave the choice to perform same-sex ceremonies or not up to the discretion of the rabbi (Weisberg). The Catholic Church has opposed gay marriage for its entire existence, and, while the Church has sought to improve the treatment of gay individuals in recent years, Pope Francis once again reaffirmed the Catholic Church's opposition to gay marriage on Friday, April 8, in a document titled *Amoris Laetitia*[8] (Faiola and Boorstein). As Image 9 shows below, the Roberts Court has heard two cases on gay marriage.

[8] In English, "The Joy of Love."

	Gin	Sot	Kag	Bre	Ken	Rob	Ali	Tho	Sca	
Windsor (2013)	P	P	P	P	**P**	A*	A*	A	A*	5-4 (pro-claim)
Obergefell (2015)	P	P	P	P	**P**	A*	A*	A*	A*	5-4 (pro-claim)

Figure 6: A Guttman scale of gay marriage cases during the Roberts Court. "P" signifies a pro-claim vote, meaning a vote in favor of a claim that the either Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment, or the Due Process Clause of the Fifth Amendment, were violated. "A" signifies an anti-claim vote, meaning a vote not in favor of the claim that the Fourteenth Amendment was violated. A letter in bold signifies that the justice wrote the majority opinion in the case. An asterisk indicates that the justice wrote either a concurring opinion or a dissenting opinion. A black box means the corresponding justice did not vote in the case. Only the first three letters of justices' last names are included.

U.S. v. Windsor (2013) and Obergefell v. Hodges (2015)

The voting blocs in the two gay marriage cases are identical (as is evident from Table 5), and the reasoning put forth by both sides is similar across the two cases; therefore, I will consider these two cases together. In both cases, the four most devout Catholics voted anti-claim while the three Jewish justices, Sotomayor, and Kennedy voted pro-claim in both cases. In other words, the majority, in both cases, accepted the claim that either the Fourteenth Amendment—particularly, the Due Process Clause and/or the Equal Protection Clause—or the equal protection component of the Due Process Clause of the Fifth Amendment were violated while the dissenters found that there was no constitutional violation in either case.

In *Windsor*, the Court ultimately ruled that the Defense of Marriage Act (DOMA) violates the Fifth Amendment. DOMA excluded same sex couples who were legally married within their states from being considered "spouses" as the term is used in a multitude of federal statutes. As a result, same-sex partners were excluded from a variety of benefits afforded to heterosexual married couples by the federal government. In *Obergefell*, the issue at hand was the decision of many states to not license same-sex marriages and to not recognize same-sex marriages that were legally performed in other states. The majority, in this case, ultimately determined that a state's failure to recognize a same-sex marriage violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. As a result, the Court ruled that states

are required to both license same-sex marriages and to recognize same-sex marriages that were legally licensed out-of-state.

Justice Kennedy wrote the majority opinion in both cases, and he uses a similar line of reasoning in each of the cases. Kennedy's affinity for protecting human dignity is in full focus as each case is littered with thoughts on how prohibiting gay marriage may damage the dignity of homosexual individuals who wish to marry. He writes, for instance, in *U.S. v. Windsor* (2013), with reference to DOMA, "The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment" (*Windsor*, at 2692). He goes on to state that DOMA deprives some couples "of both rights and responsibilities" that serve to "enhance the dignity and integrity of the person" (*Windsor*, at 2694). For Kennedy, DOMA clearly harms the dignity of a certain class of people (homosexuals); therefore, the federal statute, in his eyes, violates the Fifth Amendment. Similarly, in *Obergefell v. Hodges* (2015), Kennedy writes that states' refusal to recognize gay marriages "denied the equal dignity of men and women" (*Obergefell*, at 2603). He concludes by stating that homosexuals "ask for equal dignity in the eyes of the law. The Constitution grants them that right" (*Obergefell*, at 2608). In both cases, Kennedy is extremely influenced by his concern for human dignity; this concern is the focal point for both of the opinions.

The dissenters, for their part, acknowledge the complexity of same-sex marriage as an emotional and political issue; however, they conclude that the Constitution simply does not address same-sex marriage and that, as a result, justices cannot consider whether or not same-sex marriage is a good idea when making their decisions. In his dissenting opinion in *Windsor*, for instance, Scalia states, "It is enough to say that the Constitution neither requires nor forbids our

society to approve of same-sex marriage" (*Windsor*, at 2707). Similarly, Alito notes, "[I]f the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage" (*Windsor*, at 2716). Roberts expresses nearly the exact same sentiment in his dissenting opinion in the *Obergefell* case. Consistent with their originalist principles for constitutional interpretation, Thomas and Scalia also point out that Kennedy's conception of dignity and liberty is not consistent with the Constitution. Regarding Kennedy's focus on the dignity of same-sex couples, Thomas notes, in his dissenting opinion for *Obergefell*, "The flaw in that reasoning, of course, is that the Constitution contains no 'dignity' Clause" (*Obergefell*, at 2639). He also states that the majority's "concept of 'liberty'…bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses" (*Obergefell*, at 2632). In support of this idea, Scalia asserts, in his dissenting opinion for *Obergefell* that those who ratified the Fourteenth Amendment "did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification" (*Obergefell*, at 2628). Lastly, Scalia articulates his concern for a Court of just nine justices that largely lacks religious representativeness to reach a decision on a salient issue that is not addressed in the Constitution. He notes that there is not "a single evangelical Christian…or even a Protestant of any denomination" on the Court (*Obergefell*, at 2629). This is an interesting statement from Scalia, someone who claims to be uninfluenced by his religion when interpreting the law. This statement seems to suggest that religion at least has the potential to influence decisions (even if Scalia does not personally believe that it actually does).

Explanations for Voting Patterns in Gay Marriage Cases

From an ideological perspective, the voting behavior of the justices in these two cases seems to make sense. Once again, a pro-claim vote in gay marriage cases is typically considered

liberal while an anti-claim vote is typically considered conservative. Based on this, the four most liberal justices vote in a liberal direction while the four most conservative justices vote in a conservative direction. Though Justice Kennedy votes in a conservative direction more often than in a liberal direction, his liberal votes in the gay marriage cases are not entirely surprising based purely on ideology as he is typically the swing voter in split decisions. Therefore, ideology may serve as an explanatory factor for at least eight of the justices, and Justice Kennedy's vote is not entirely inconsistent with his ideology. As always, if religion plays a role in shaping or influencing ideology, it implicitly plays a role in shaping the justice's gay marriage decisions even if these votes can largely be explained through ideology.

Beyond its influence on ideology, religion may play additional roles in influencing justices' opinions in these cases. Most obviously, the majority of the Catholic justices' votes in these cases align with the official teachings of the Catholic Church, meaning religion may explicitly influence votes on gay marriage cases for Catholic justices.. While Judaism is not as united in its position on gay marriage, the Jewish justices certainly do not vote in a manner that is inconsistent with the teachings of at least many Jewish leaders who support gay marriage. Therefore, the justices may be inclined in these cases to vote in a manner that reflects the stances of their religious affiliations on this issue.

In addition, there appears to be a divide between the voting blocs with regard to what ideals are most important in these cases. For instance, the majority is clearly concerned with the issue of equality. Conversely, the dissenters do not seem merely as concerned with equality; rather, Thomas in his dissenting opinion in *Obergefell* states, "[T]he majority's decision threatens the religious liberty our Nation has long sought to protect" (*Obergefell*, at 2638). Given this, the ideals of equality, on one hand, and religious freedom, on the other, may be in competition. The Jewish justices (and Sotomayor) as liberals, may place an emphasis on equality

given their ideological positions (which, once again, might be influenced by religion in the first place). Another possibility is that as religious minorities, or, in Sotomayor's case, as a racial minority, these individuals resonate with underrepresented individuals or with minorities and that being identified as a minority inclines these justices to vote in a pro-claim direction in gay marriage cases in order to promote equality, in which case religion implicitly influences these decisions. (This is similar to the line of reasoning presented on the votes of Jewish justices and Sotomayor in the "Cases Pertaining Directly to Religion" section.) Conversely, as members of a more prominent religion, the Catholic justices may simply not be as concerned with equality. Instead, as noted in the "Cases Pertaining Directly to Religion" section, these justices may be concerned with promoting the free exercise of religion. If the Catholic justices view the gay marriage cases through this lens, given their propensity to vote pro-claim in freedom of religion cases, it makes sense that they would vote anti-claim in gay marriage cases (because a pro-claim vote in gay marriage cases, in their eyes, would serve to limit religious freedom).

While ideological and religious concerns mentioned above may both be helpful in explaining the voting behavior of most of the justices, they are not entirely helpful in explaining Justice Kennedy's voting behavior. As is often the case, it is Justice Kennedy's affinity for human dignity that helps to explain his votes in these cases. As is evident in his opinions, Justice Kennedy is very concerned with protecting the dignity of all individuals, including same-sex couples. For Kennedy, the way to protect this dignity is to vote pro-claim in gay marriage cases. This emphasis on human dignity may be ideological, but it is also consistent with his Catholicism. Therefore, Kennedy's religious views paradoxically may actually influence him to vote in a manner that is inconsistent with the official teachings of his religion.

Both religion and ideology may serve as explanatory factors for the voting patterns displayed in gay marriage cases. Through its influence on ideology and principles for

constitutional interpretation, religion implicitly influences justices' decisions in these cases. Furthermore, religion in and of itself—through its connection to equality, dignity, and freedom—may hold significant explanatory power for at least some of the justices. Rarely can cases be explained by a single variable, and gay marriage cases are no exceptions. Gay marriage is a complex issue and religion alone cannot entirely explain the voting behavior of justices; nonetheless, it does appear likely that religion does play a role in influencing justices' decision in these cases.

Summary of Non-Religion Cases

As a whole, this section reveals that religion likely plays a role in judicial decision making in cases for a variety of policy issues. Given the complexity of judicial decision making, it is difficult—if not impossible—to quantify the effect of religion and to determine its precise function within every case.

For abortion and gay marriage cases, the justices' votes largely reflect the official stances of their religious affiliations on these issues. With regard to the death penalty, however, the votes of the majority of the Catholic justices do not accurately reflect the official stance of the Church. The fact that, in the majority of these cases, justices vote in a way that aligns with the doctrine of their religion (or, at least, in a way that is not in opposition to the religion's doctrine) supports the idea that religion may explicitly influence decision making or implicitly influence decisions through its effect on ideology, principles for interpretation, and the ideals that justices hold dear. (It does not, however, provide *definitive* proof that religion is the key factor—or even a factor—in the decision making process). Conversely, the fact that, in at least some cases, justices vote contrarily to what would be expected based solely on the views of their religion suggests that religion may not explicitly be a strong explanatory factor in every non-religion case. If this is the case, ideology or another factor may serve as a better explanation for the justices' votes. Another

possibility is that religion influences justices' ideologies and ideals in such a way that it actually provides an explanation, paradoxically, for justices' deviations from the official views of their religion. In all likelihood, the answer lies somewhere in between; religion likely provides at least a partial explanation for justices' decisions in many of the cases, but it is certainly not the only explanatory factor influencing the justices' decisions.

A comparison between the abortion and death penalty cases may provide valuable insight into these cases. Once again, in these cases, the voting patterns might be explainable based on ideology. It is also interesting to note that, in abortion cases concerning the regulation of abortion, the Catholic justices vote in alignment with the Catholic Church, but, in death penalty cases, these same justices do not vote in alignment with the Church. Furthermore, in the abortion cases, the Jewish/liberal justices often rebuke the devout Catholic justices' use of morality as a justification for their decisions; similarly, in death penalty cases, it is the Catholic justices who voice displeasure with the other justices' use of moral arguments in their opinions. It is possible that the strength of the Catholic Church's moral opposition to abortion relative to its moral opposition to the death penalty may help to explain the votes of the Catholic justices. For instance, the Catholic Church has, for a long time, been known for its very strong opposition to abortion on moral grounds; in contrast, the Church has only officially opposed the death penalty for a few decades now. Similarly, some Catholic clergy have threatened to withhold the Eucharist from Catholic politicians who support abortion while there is really no analogue of this for death penalty cases (Turley). For these reasons, the Catholic justices may be more inclined to vote in alignment with the Catholic Church in abortion cases (which also provides support for the policy agenda argument—provided in the "The Role of Religion in the Nomination Process" section—that Republican presidents might view Catholics as pro-life when nominating

individuals to the Supreme Court) while there might be a perception among these justices that it is easier to not vote in alignment with the Church in death penalty cases.

In conclusion, there is indeed a significant amount of ambiguity surrounding the mechanisms through which justices are influenced in their decision making processes for abortion, death penalty, and gay marriage cases. There is a high probability that numerous factors influence justices' decision in these cases. Religion is very likely one of these factors. In a variety of manners, religion may influence justices to vote in a certain direction in many of these cases.

Discussion and Conclusions

Specific conclusions are made within each section of the thesis. However, taking the research as a whole, there are some broader conclusions that can be reached. Combining the information on the religious backgrounds of justices and the qualitative analysis of justices' opinions, perhaps the most clear conclusion is that religion influences different justices in different manners. Justices Scalia, Kennedy, and Sotomayor, for instance, are all identified as Catholics. Nonetheless, they are influenced in completely different manners by Catholic doctrine and beliefs; furthermore, they have all had very different experiences within the Catholic Church, which has further impacted how they are influenced by the religion. These differences are quite apparent within the voting patterns and opinions of these justices.

In addition, the qualitative analysis of the justices reveals that (for at least some justices) religion may directly influence ideology and principles for constitutional and statutory interpretation. (Scalia and Thomas are strong examples of this.) As a result, for these justices, religion likely plays an implicit role in decision making even in cases where ideology is the probable explanatory factor. Beyond simply influencing ideology, religion may also influence judicial decision making in other manners, specifically through its connection to minority

identity. For instance, the Jewish justices, as members of a minority religion, may view litigants who represent a minority group in a different light than the Catholic justices, which may affect the decision reached by these justices. Lastly, religion, may, in some cases, cause deviation from ideology (as in the Catholic justices' votes in free exercise cases) or may serve as a partial explanation for a justice voting in a manner that contradicts the official doctrine of his/her religion (as in the Catholic justices' votes in death penalty cases or Justice Kennedy's votes in the gay marriage cases). Once again, there is much ambiguity surrounding religion and Supreme Court decision making, making it extremely difficult to reach firm or absolute conclusions. Despite this reality, the conclusions reached in this section are supported by the data and information available, and the overall conclusion is that, though religion certainly does not fully explain judicial decision making in all cases, it is—at the very least—likely a useful variable for partially explaining at least some decisions made by justices.

The specific conclusions included within the various sections of this thesis and the conclusions discussed in the previous paragraphs are significant for a variety of reasons. First and foremost, this research yields a greater understanding of factors that influence Supreme Court decision making. This—in and of itself—is a significant contribution to the field. This understanding is of even greater significance because of its practical application to the world. Specifically, this increased understanding of Supreme Court decision making could be valuable for litigants as they prepare cases to be heard before the Court, especially religious litigants or litigants involved in a case pertaining to a policy in which religion is explicitly or implicitly relevant. Furthermore, a greater understanding of the Court among the public, in general, might increase the perceived legitimacy of the Court simply by making the Court seem more accessible. At the same time, knowledge of religion being influential for judicial decision making might actually reduce legitimacy if citizens believe that religion should serve no purpose

in judicial decision making. Either way, this is significant as the Court's power rests in the legitimacy the public places on it.

While this research provides a strong basis for understanding the relationship between religion and Supreme Court decision making, there is still much work for future researchers to do. Ideas for future research include comparing the Roberts Court—a fairly conservative, Catholic-majority Court—to the Supreme Court from the 1970s—a fairly conservative Court with more Protestants—and comparing the Court of 2015-2016, a Court with only Catholics and Jews, to the Court of the 1990s, a more religiously diverse Court. In addition, future researchers may want to analyze amicus briefs submitted by religious organizations in cases in which religion may have played a significant role. Furthermore, analyzing the public opinion of members of various religions on issues in which religion is relevant (such as abortion, the death penalty, and gay marriage) may provide additional insight into the role religion plays in influencing Supreme Court decision making. While there is still much work to be done, the work of this thesis provides a strong foundation. This research reveals that religion is possibly a factor that influences the decision making processes for at least some justices in both explicit and implicit manners. As more research is conducted, hopefully a clearer understanding of the effect of religion on judicial decision making—and the mechanisms through which this effect occurs—will emerge.

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